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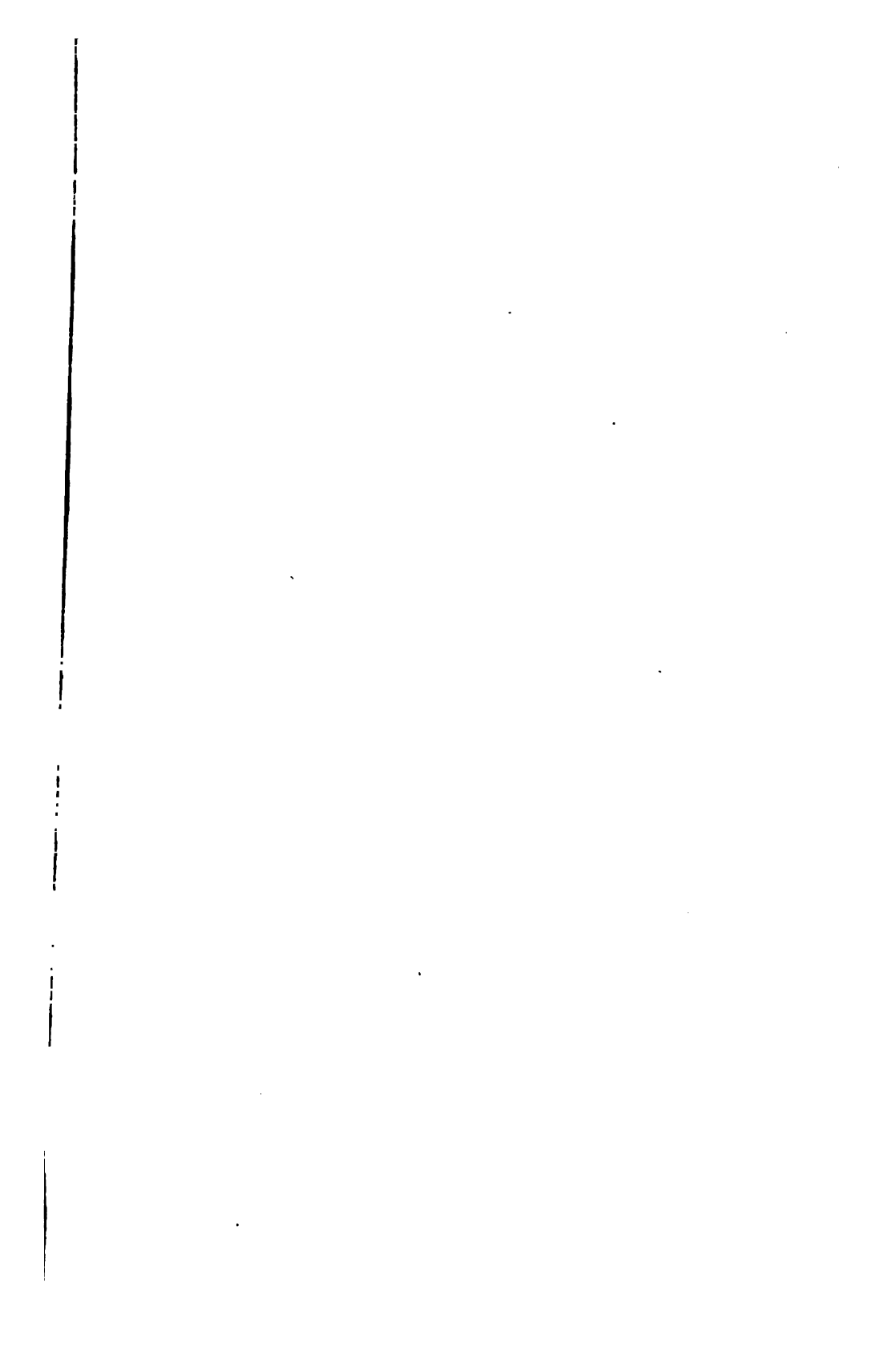
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REPORTS
OF
CASES ARGUED AND DECIDED
IN THE
CIRCUIT COURT OF THE UNITED STATES,
FOR THE
SEVENTH CIRCUIT.

BY JOHN McLEAN,
CIRCUIT JUDGE.

VOLUME V.

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JUDGES,
WHOSE DECISIONS ARE REPORTED IN THIS VOLUME. •

JOHN McLEAN,
ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND
JUDGE OF THE SEVENTH CIRCUIT.

HON. ROSS WILKINS,
DISTRICT JUDGE FOR MICHIGAN.

HON. H. H. LEAVITT,
DISTRICT JUDGE FOR OHIO.

HON. E. M. HUNTINGTON,
DISTRICT JUDGE FOR INDIANA.

HON. THOMAS DRUMMOND,
DISTRICT JUDGE FOR ILLINOIS.

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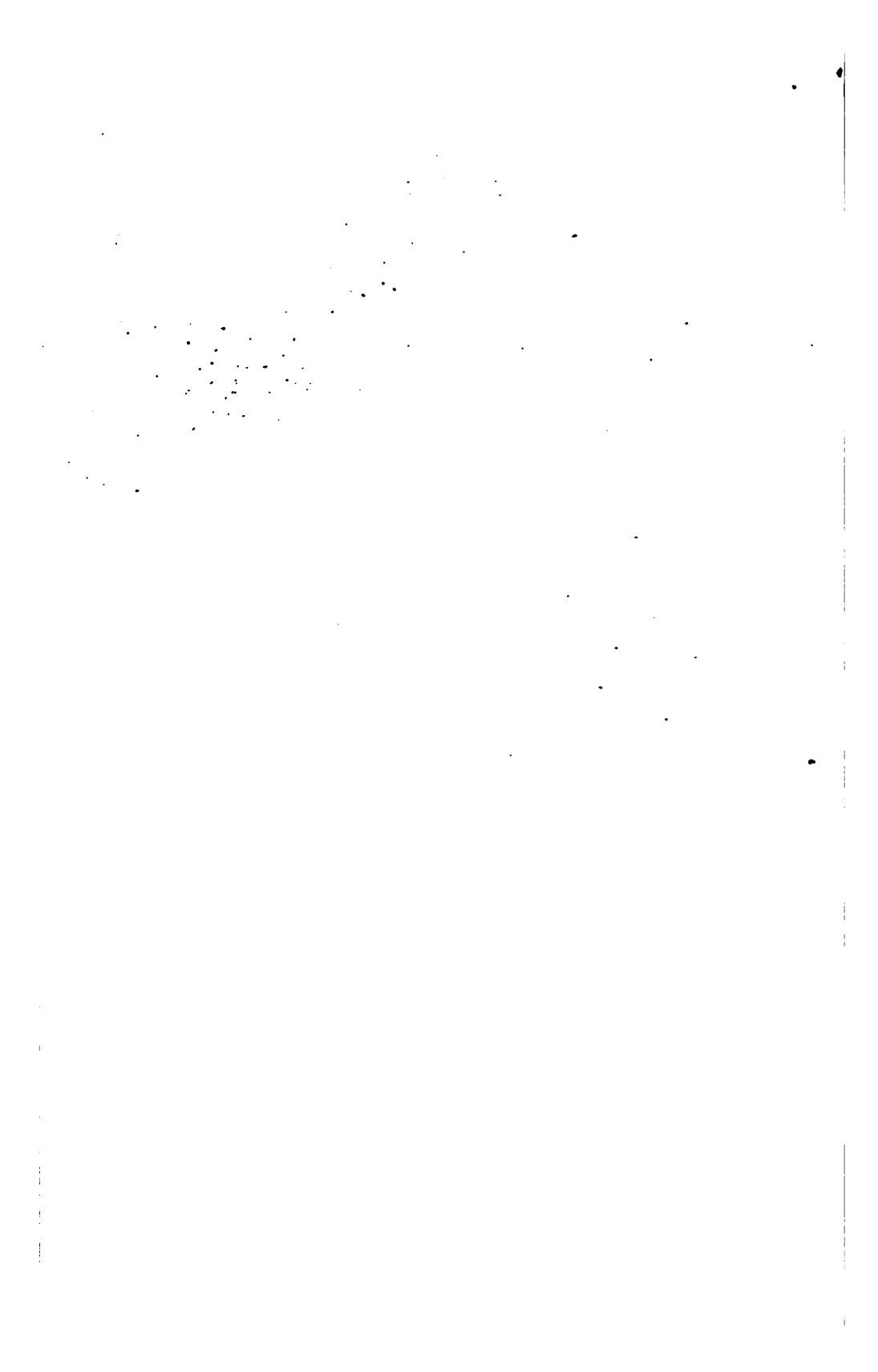
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CIRCUIT COURT OF THE UNITED STATES.

OHIO—OCTOBER TERM, 1849.

WILSON v. STOLLY.

A license to run a planing machine may be assigned, it not being a mere personal privilege.

In such case the assignee is bound to perform the conditions of the license.

The same rule applies to the assignment of his right by the licensor.

And a forfeiture of the license may be enforced according to its terms, by reason of the abandonment or neglect of the licensee.

Messrs. *Norton* and *Stanbery* for plaintiff.

Messrs. *Gwynne* and *Corwin* for defendant.

OPINION OF THE COURT.

THIS is an action at law, to recover damages for the infringement of Woodworth's patent for planing boards, which has been assigned to the plaintiff.

The defendant sets up a license in his defense. Plaintiff alleges that the license was forfeited by the defendant.

The license was given by Brooks and Morris, in whom the right to the patent was vested, but they have since assigned to the plaintiff. In that assignment the license to Stolly and others is referred to, and Wilson, the plaintiff, bound himself to do what Brooks and Morris were bound to do.

In the license it is stated that Stolly has two planing machines, and he was authorized to run either. Stolly agreed to pay one dollar and twenty-five cents to the lessor, or his assigns, for every thousand feet of boards by him planed, to be paid every Monday morning, during the term of the lease ; and that he will work for cash only.

He bound himself to keep regular books, to be inspected when required by the licensor, and that he would make his return under oath, when required. Among other provisions of the contract, it was agreed, if said Stolly elect to abandon the running of his machines as aforesaid, or cease for two weeks to run the same, then such neglect to run shall be considered an abandonment on his part, and said Brooks and Morris may consider this contract at an end.

Under the contract, Stolly had a right to abandon it without cause. The neglect, for two weeks, to run the machine, might be considered an abandonment by the plaintiff. A formal notice was not necessary by the plaintiff, that he considered the failure to run the machine two weeks as an abandonment. Any unequivocal act, showing a waiver of the right to put an end to the contract, such as an expressed determination to enforce it, would be sufficient ; or an acceptance of rent subsequently. A refusal to receive the rent would show, that he considered the contract terminated.

It seems, from the testimony, that Stolly sold his license to Garrard. The license, we suppose, was assignable, as it could not be considered a personal privilege. Garrard purchased the machine of Stolly, and commenced running it the 1st of June, 1846. Inquiry was made of Garrard, by Wilson, jun., by what right he was running the machine ; and he was informed that he was running under Stolly's license, which had been assigned to him, and that his father, the plaintiff, had promised to give him a license if Stolly would abandon his license. Young Wilson then gave Garrard notice to cease running the machine. Stolly was then in the

Wilson v. Stolly.

shop, and told Garrard to go on,—that he would stand between him and Wilson. Witness run the machine from 1st June to October, 1846.

In September, Garrard informed Stolly, that he had made an agreement with Wilson, to run the machine. Stolly proposed to Garrard to rescind the sale of the machine, and refund the money, and give him the use of the property up to that time, but Garrard refused to cancel the contract.

On the 30th of September, 1846, Stolly commenced an action of replevin for the machine, until which time Garrard continued to run it. About two weeks before this, Stolly commenced running a new machine. Garrard was induced to purchase in the first, by the representations of Stolly, that he would give his custom in that business, as far as he could, by sending his customers to him. When the sale was made to Garrard, Stolly stated as a reason for selling, that his saw mill and the planing machine afforded more business than he could attend to.

From these facts, gentlemen of the jury, it will be for you to say, whether there was not an abandonment of his license by Stolly. He sold his machine, agreed to transfer his license, and ceased to run a machine from some time in May till some time in September. To cease two weeks was an abandonment under the contract. But here was an abandonment of more than three months, under a declaration that he intended to quit the business, as he had more to do than he could attend to. Under these facts, it will not be difficult for you to render a verdict in the case, and you will find such damages in favor of the plaintiff as you shall think the circumstances require.

Verdict for the plaintiff.

PARKER v. CARTZLER.

A motion was made by Mr. Mason, to retax the costs of a witness summoned in eleven cases, and charged for an attendance in each. Cited 1 Statutes at Large, act of 1789 ; 3 do. sec. 21, act.

This motion was opposed by Mr. Noble, who cited 5 Mass. Rep. 313 ; 10 Ib. 174 ; 1 Sumner, 514 ; 1 Pick. 452, and 1 Wend. 68.

BY THE COURT.

The court have generally followed the practice of the State Court, in allowing witness fees. In perhaps all the States in this circuit, each witness is allowed to claim his per diem in all the cases in which he has been summoned. But this in some cases would give a witness in the Circuit Court of the United States from ten to twenty dollars each day. Such cases require the alteration of the rule, and we, therefore, adopt a rule, " that where a witness shall be summoned in several causes, he shall be allowed a per diem and mileage only in one case ; and such allowance shall be distributed and charged equally among the cases in which he shall be summoned."

J. P. PRICE ET AL. v. ISAIAH MORRIS ET AL.

Administrators or Executors in another State, may sue in this State under the laws of Ohio.

A grant of letters duly certified is sufficient authority to sue in Ohio.

A deposition taken before a Mayor, without a seal, may be received as prima facie evidence of the right to take it.

Where an administrator becomes a purchaser, at his own sale of real estate, the sale may be set aside at the discretion of the parties interested.

Such sale is voidable, though no fraud be shown.

Price et al. v. Morris et al.

Messrs. *Thompson and Andrews*, for plaintiff.

Mr. *Scott and Frazer*, for defendant.

OPINION OF THE COURT.

This is an action of ejectment, brought to recover seven-teen hundred and fifty acres of land, in Clinton county.

1. A certified copy of the patent was introduced by the lessors, Brook Duvall and Maria French, heirs of Daniel Duvall, deceased, dated 19th August, 1807.

2. A deed from William French and wife who married Maria French, dated 2d Nov. 1807, to the lessors of the plaintiff, four of the heirs of William D. Price, for one undivided half and five-sevenths of an undivided half.

3. Deed from William D. Price to James Price.

The marriage of Maria French was proved, and that she had seven children, some of whom died before the mother. They lived in Virginia. The heirship of the other parties proved by different witnesses.

It was objected that the chief magistrate of Fayetteville, before whom some of the depositions were taken, did not certify the same under his seal, and that there was no proof of his official character. The depositions being certified by him as Mayor, the court will presume that he is Mayor unless the contrary be shown. He may have no seal. The certificate of a person named in the act of Congress, as having authority to take depositions, is received *prima facie*, without further proof of his authority.

The defendants claim under a sale by William Duvall, administrator of William Price; the proceedings in the Court of Common Pleas, authorizing the sale were in evidence, and also the deed of the administrator, for the land sold to Haworths, dated 1st March, 1811. And the account of the administrator rendered to the Probate Court, showed the payment of the consideration. The two hundred and forty-

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Price et al. v. Morris et al.

second section of the law of Ohio, respecting executors and administrators, provides, "that an executor or administrator duly appointed in any other State or country may commence and prosecute any action or suit in law or equity, in any court in this State, in his capacity of executor or administrator, in like manner, and under like restrictions, as a non-resident may be permitted to sue."

It is objected that there was no sufficient evidence that Duvall was appointed administrator; but the court held that the record of his appointment and the letters of administration, duly certified, were a sufficient authority for him to act as such in this State.

It was also objected that an administrator cannot sell to himself. It appears that Henry A. Christian bid off the land for Duvall, the administrator. A trustee cannot sell to himself; at least such a sale, though not void, there being no fraud, yet it may be avoided at the discretion of the party interested.

In their charge to the jury, the court said: In this case the legal title must prevail. The patent to Brook Duvall and Maria French, heirs of Daniel Duvall, deceased, is dated the 19th of August, 1807. On the 2d of November, the land was conveyed by William French and Maria his wife, and Humphrey Brook Duvall to William Price. And the jury are to inquire whether Humphrey Brook Duvall and the persons named in the patent are the heirs of Daniel Duvall.

That Humphrey was one of the heirs seems to be probable, from the fact that he united with Maria French and her husband, who owned one-half the land, and of whose identity there is no question, in executing a conveyance of the land.

It was proved that William Duvall died the latter part of the year 1808. He left several children his heirs, who are the lessors of the plaintiff, and who are proved to have lived

in Virginia and other States than Ohio, from their early years.

On the 1st of August, 1842, the heirs of Maria French with one exception, executed a deed of confirmation for the land to the heirs of William Price.

The above constitutes the title of the plaintiff.

On the 12th of November, 1808, administration was granted in Virginia to William Duvall, on the estate of William Price.

Under the authority of the Court of Common Pleas of Warren county, he sold, as administrator, an undivided half of the land in controversy to George and James Haworth. And in the same deed one moiety of the tract on his own account. In the deed it is stated that the land was patented in the name of Brook Duvall and Maria French, heirs of Daniel Duvall, deceased.

J. C. Travis proves the heirs of Humphrey Brook Duvall, deceased, and that they reside in the States of Kentucky and Tennessee. The time of Duvall's death is not stated.

In relation to the statute of limitations which is set up in defense, Malon Haworth states that in the fall of 1804, George Haworth lived on the land. Witness has lived adjoining to the land since 1804. Mr. Frazer proves possession of George and James Haworth in 1804. Another witness proves that in 1809, in March, he saw George and James Haworth at his house, and that they informed him they were on their way to old Virginia, with a view of buying the land now in controversy.

Henry A. Chirty, now reported to be dead, came to the country, as the agent of William Duvall, before Haworths returned. He made the application to the court on which the sale was ordered, and he purchased the land.

It does not appear how William Duvall became interested in the land, owning an undivided moiety, unless by his purchase at his own sale as administrator. He was not one of

the heirs of Daniel Duvall. And if his interest was acquired as above stated, the heirs had a right to set aside the purchase, merely on the ground that he could not be the purchaser at his own sale. This is contrary to the policy of the law, and is voidable on that ground.

The statute of limitations at that time did not run against non-residents, and possession before the emanation of the patent, did not run against the State. If the possession was adverse, and the non-resident who owns the land should come into the State, the statute would begin to run from such time.

Upon the whole, gentlemen of the jury, so far as the sale was made by the administrator, in his capacity as such, there seems to be no legal objection against the right, but it is not shown in the case that William Duvall had any other right than that which he supposed himself to acquire at his own sale; and which purchase the heirs object to by bringing the present action.

The jury found upon the first demise of the declaration, that the defendants are guilty in manner and form as the plaintiffs have declared against them, as to three-fourths of an undivided half of said premises in said demise and consent rules mentioned, being three-fourths of that part of said undivided half, which the defendants claim to hold under William Duvall by deed made by said Duvall, purporting to come in his own right, said half to James and George Halloworth; and as to the residue of said estate and premises and the demises in said declaration, the jury do find the defendants not guilty.

And thereupon the plaintiffs' counsel moved for a new trial, on which motion the cause was continued. At the next term the cause, at the instance of the counsel, was entered as settled, at the plaintiff's cost, judgment, &c.

UNITED STATES v. LYTLE ET AL.

[This opinion was prepared, though not delivered. The case was taken up and adjusted on equitable principles, by Mr. MERRITT, the Secretary of the Treasury. As the questions raised by the demurrer are not understood to have influenced the adjustment of the claim, on its merits; and as the view of the court on the demurrer embraced some matters of interest, the opinion is published.]

The executive in carrying into effect laws, must necessarily give a construction to them, and such construction is binding upon the judiciary, when private rights are not affected.

The Treasury Department cannot enlarge the district of a Surveyor General, but where such district depends upon the construction of various acts of Congress, and those acts have been uniformly construed one way, and such construction has been repeatedly sanctioned by legislative action, it must be considered as conclusive on the judiciary.

And where such construction had been fixed for years, a security to a Surveyor General's bond, cannot set up in defence as a bar to a suit on the bond that the duties as performed were beyond the proper limits of the Surveyor General's district.

Mr. *Burtley*, Dist. Att'y, and Mr. *Stanbery*, for plaintiff.
Messrs *Ewing* and *Swayne* for defendant.

OPINION OF THE COURT.

This action is brought on an official bond given by Robert T. Lytle, as Surveyor General, dated 29th April, 1836. The bond recites, "that whereas, the President of the United States had, pursuant to law, appointed Robert T. Lytle, the Surveyor General of the Public Lands, in the States of Ohio, Indiana, and Michigan Territory," &c., the conditions of which were, "that the said Robert T. Lytle should faithfully disburse, according to law, all moneys placed in his hands for disbursement, and should faithfully discharge the duties of said office."

The declaration contained many counts, to which several pleas were filed, setting up that the duties of Lytle were to be

performed, and his disbursements made, within the States of Ohio and Indiana, and that part of Michigan Territory east of a line drawn due north from the Wabash river and Port Vincennes to the Canada shore ; and that a large part of the moneys placed in his hands for disbursement, was required to be disbursed beyond these limits, and for the faithful disbursement of which, the sureties of the said Lytle are not responsible ; and that the accounts kept by the government do not distinguish between the sums disbursed by him beyond those limits, and those paid within them. The plaintiffs demurred to these pleas.

By the pleadings, the issue is made to turn upon the extent of the legally constituted district of the Surveyor General.

The 1st section of the act of May 18, 1796, provided, " That a Surveyor General shall be appointed, whose duty it shall be to engage a sufficient number of skillful surveyors as his deputies, whom he shall cause, without delay, to survey and mark the unascertained outlines of the lands lying north-west of the Ohio river, and above the mouth of the Kentucky river, in which the titles of the Indian tribes have been extinguished," &c.

The act of March 26, 1804, extends the power of the Surveyor General over all the public lands of the United States, to which the Indian title has been or shall be hereafter extinguished, north of the river Ohio, and east of the river Mississippi."

On the 28th February, 1809, the Illinois Territory was established, to consist of " all that part of Indiana Territory which lies west of the Wabash river, and a direct line drawn from said Wabash river and Port Vincennes, due north, to the territorial line and Canada shore."

The act of April 20, 1816, authorizes the appointment of a " Surveyor of the lands of the United States, in the Territories of Illinois and Missouri. And he is required to cause so much of the public land to be surveyed as the President

of the United States shall direct, and to which the titles of the Indian tribes have been extinguished, in the manner, and to do and perform all such other acts in relation to such lands, as the Surveyor General is authorized and directed to do in relation to the same." And all repugnant acts are repealed.

These acts, it is admitted, reduced the district of the Surveyor General, to the States of Ohio and Indiana, and so much of the Michigan Territory as lies east of the line above designated, as constituting the eastern boundary of the Illinois Territory.

By the act of April 18, 1818, the people of Illinois were authorized to form a constitution and establish a State government. The State to be bounded on the north by latitude 42 deg. 30 min., and all the country north of that line was annexed to Michigan Territory. This is the tract of country embraced by Wisconsin. And it is claimed that the annexed territory was taken out of the jurisdiction of the surveyor for Illinois and Missouri, and placed in that of the Surveyor General, who, it is contended, had jurisdiction over all the public lands, to which the Indian title was extinguished, and which were not made subject to any other surveyor.

When the Surveyor General was first appointed, his jurisdiction was limited and special over the public lands, and it has continued to be so. In this respect his powers appear to be similar to those of the surveyors which have since been appointed. His district was large at first, but it was reduced by the establishment of other and independent districts, and the law confers upon him no general powers which do not belong to other surveyors. There seems to be, therefore, no ground for the position that his powers extend to all the public lands wherever situated, which do not lie within a special jurisdiction. He is called the Surveyor General, but he has no superintendency over the other surveyors, and the name having been given, it is presumed, to distinguish him from the

deputy surveyors he was authorized to appoint, it is still accorded to him generally, although the same reason would apply it to other surveyors who exercise similar powers, and who, in various other acts, are called Surveyors General.

The great question in the case is, whether the district of country west of lake Michigan, and within the Territory of Michigan, was embraced by the district for which Lytle was appointed Surveyor General.

There can be no doubt that the Treasury department considered the country west of lake Michigan as being within his district.

In explanation of the estimates of the expenses of surveying the public lands, for the year 1833, submitted by the Secretary of the Treasury, there was an item of \$50,000 "for Ohio, Indiana, and Michigan peninsula; also surveys west of the lake." These items were contained in the report of the Commissioner of the General Land Office. And in an official letter of Mr. Williams, the predecessor of Mr. Lytle, Nov. 7, 1832, the following items of expenditure are required: "For surveying the public lands in the Michigan Territory, west of lake Michigan, for contracts now existing, \$20,000. For other surveys in Ohio, Indiana, and the peninsula of Michigan, \$5,000."

In a letter of the Commissioner of the General Land Office, dated 9th February, 1836, in answer to inquiries made of him by a member of the House of Representatives, he says: "As those lands lying north of the State of Missouri are in the Territory of Michigan, they would, therefore, be under the jurisdiction of the Surveyor General, at Cincinnati." And in an official letter to Mr. Lytle, dated 16th August, 1836, he says, "\$50,000 have been appropriated for surveying in Michigan Territory, west of the lake, and in Wisconsin Territory, which amount exceeds, by \$25,000, that submitted in your last annual report."

These, and other official letters of the Surveyor General and of the Treasury Department, show, that before the date of Lytle's bond, and after it, his district was considered as embracing the whole of Michigan Territory.

In the argument it was stated, that the terms Surveyor General were applied only to the surveyor of the above district. In this the counsel are mistaken. In the correspondence of the Land Office, other surveyors are occasionally called Surveyors General; and also in the reports of committees. In the act of March 3, 1831, to create the office of surveyor of the public lands for the State of Louisiana, the first section provides, "that a Surveyor General for the State of Louisiana shall be appointed," &c. And also in the act of May 7th, 1822, by the first section, "every Surveyor General is required to give bond." And in the second section, "the commission of every Surveyor General in office was to expire on the 1st day of February ensuing; and every Surveyor General's commission afterwards, was limited to four years."

But, generally, the name of Surveyor General was applied to the surveyor of Ohio, Indiana, and Michigan. And where such designation is used in any of the acts, which have a bearing on this controversy, there can be no doubt of its application.

The views of the Treasury Department in regard to the extent of the Surveyor General's district, were sanctioned by numerous acts of Congress. This has been done uniformly since the passage of the act of April 18, 1818, authorizing the people of Illinois to establish a State government, and annexing the territory north of the State boundary to Michigan. Such annexation seems to have been considered by Congress and the Treasury Department, as extending the Surveyor General's district.

By the act of March 3, 1831, all the public lands to which the Indian title had been extinguished, lying north of the

northern boundary of the State of Illinois, west of Lake Michigan, and east of the Mississippi river, were required to be surveyed in the same manner, and under the same regulations, &c., as other lands are surveyed. The act of June 28th, 1834, attached the country north of the State of Missouri, west of the Mississippi, and east of the Missouri river, to Michigan territory. This district afterwards constituted the territory of Iowa.

The act of May 11th, 1820, continued the powers of the commissioners to decide on the "rights of certain claimants of land in the district of Detroit, and for other purposes," appointed under the act of 23d April, 1812. And the commissioners were authorized to ascertain the claims to land at the settlements of Green Bay and Prairie des Chiens; and the 2d sec. of the latter act was revived. By that section the tracts confirmed were directed to be surveyed under the direction of the Surveyor General, by such of his assistants as the said Surveyor General shall appoint.

By the act of Feb. 21, 1823, the above act of 1820 is revived and extended to claims in the county of Michilimackinaw, and the 6th sec. provides, that it "shall be the duty of the Surveyor General of the United States, under the direction of the Secretary of the Treasury, to cause the land confirmed by this act to be surveyed," &c. These claims were west of Lake Michigan.

The act of July 2d, 1836, required the Surveyor General to lay off the towns of Fort Madison and Burlington, Bellevue, Dubuque, and Peru, in the Territory of Wisconsin.

By the act of April 20th, 1836, the Wisconsin Territory was organized, and Iowa was annexed to it. The 12th section enacted that the laws of the United States are hereby extended over, and shall be in force, in said Territory, so far as the same or any provisions thereof may be applicable.

A letter from the Commissioner of the General Land Office, dated Aug. 28, 1831, to Mr. Williams, the predeces-

sor of Lytle, directed him to cause to be surveyed without unnecessary delay, the four principal meridian lines in continuation of that meridian which will be run by Col. McKee," (the surveyor of Illinois and Missouri) to the northern boundary line of Illinois. That line strikes the Wisconsin river, north of Illinois, not far from the Mississippi.

In the appropriation bills since 1827, the Surveyor General of Ohio, Indiana, and Michigan, is named, as the other surveyors are, of the States and Territories which compose their several districts. This shows the view of Congress as to the extent of their respective districts.

The Territory of Wisconsin was created by the act of April 20th, 1836; and by the act of June 12th, 1838, provision was made for the appointment of a surveyor of the territory, "who shall have authority and perform the same duties respecting the public lands, and private land claims in the Territory of Wisconsin, as are now vested in and required of the surveyor of the lands of the United States in Ohio." And the 2d section requires the "surveyor for Ohio to deliver to the surveyor of Wisconsin Territory, all the maps, papers, records, and documents, relating to the public lands and private land claims in the said Territory of Wisconsin, which may be in his office."

This latter act is conclusive as to the construction given by Congress, in regard to the extent of the district of the Surveyor General. The act was passed subsequent to the date of Lytle's bond, and it cannot, therefore, affect the legality of the bond, but it is referred to as showing the uniform construction of the district, and in corroboration of prior acts.

The appropriation bill for 1818, gives \$1000 to the surveyor of the Illinois and Missouri Territories. In a similar bill for 1819, the State of Illinois having been established, the appropriation was for the like sum to the surveyor in the State of Illinois and the Missouri Territory. And such was

substantially the designation given to the above surveyor down to the year 1836. Prior to that, the appropriations for surveying were made in gross ; but in that year they were made specifically, for the Michigan Peninsula, and for Michigan west of the Lake, and in Wisconsin ; and also for Illinois and Missouri. This mode of making such appropriations has since been observed.

Since the act of 1816, constituting a surveyor's district of the Illinois and Missouri Territories, and which limited the jurisdiction of the Surveyor General of Ohio to the eastern line of Illinois, there has been no direct legislative action on the subject. And it is contended that the boundaries of a surveyor's district can only be extended or altered by direct legislation.

In establishing surveyor's districts, States and Territories are referred to, as a convenient mode of fixing their boundaries. They might have been described by water courses, degrees of latitude, or by mathematical lines between given points. But the boundaries of States and Territories being better known, generally, than other lines, they have been preferred. Surveyor's districts thus formed, are in no way connected with the political organization of a State or Territory, or affected by the change of their boundaries.

By the act of March 3, 1807, the President of the United States was authorized to lease lead mines in the Indiana Territory ; but those mines were included within the Illinois Territory, subsequently established, and it was objected, therefore, on that and other grounds, that the President had no power to lease. But the court, in 1 McLean 158, said, " the act authorizing the President to lease lead mines refers to them as situated in the Territory of Indiana ; but this is merely descriptive of the locality of the mines, and does not limit the exercise of the power to the boundaries of Indiana, as they might afterwards be changed. The lead mines within the original limits of the Territory were the mines which the law authorized the President to lease ; and no sub-

division of the territory, or change from a territorial to a state government, can affect the exercise of the power.”

These remarks have some application to the principle of the case under consideration. And if it stood upon the acts of 1816 and 1818, it would seem that the Surveyor General's district was limited to the eastern line of the Illinois territory. The act of 1818, which attached the land north of the state line of Illinois to Michigan, enlarged that territory, but this did not necessarily enlarge the district of the Surveyor General. But a different construction has been placed upon that act by the Treasury Department, and by Congress. It cannot be doubted that they construed the district of the Surveyor General as embracing the whole of the Michigan territory. And this construction has been acted upon by the Treasury Department from 1818, in directing surveys to be made, and in issuing patents; and by Congress, in making appropriations for such surveys; in requiring private claims to be surveyed west of Lake Michigan, by the Surveyor General, and by making no other provision for surveys within that territory.

It is admitted that the Treasury Department has not power to establish or alter the district of the Surveyor General. But the executive branch of the government is bound to give effect to the laws which regulate its duties. And this necessarily requires a construction of those laws. And where such construction has been acted on for a great number of years, under the sanctions of the law-making power, it becomes a serious question how far the judicial power can or should interfere. So far as the public are concerned, there can be no doubt that the surveys made by the Surveyor General, in every part of Michigan, are valid. And we suppose that the surveys of private claims, under the special acts, within the same territory, are also valid. Under these acts of the government, rights have been acquired, which ought not, and, perhaps, cannot be shaken. Lapse of time,

with its healing effects, and in all its force, applies to such rights.

Where, under an executive construction of the law, a wrong is done to an individual, the courts will give him redress. But where no such wrong is done, it is supposed that acts of the executive within the general scope of its powers, and by virtue of law, cannot be reviewed, though, to some extent, the letter of the law may not have been followed. There is no court of errors, in which executive decisions that do not affect individual rights, can be reversed.

Congress have, since 1827, in prescribing the duties of the Surveyor General, in appropriating his salary, and in all legislative reference to him, spoken of him as the Surveyor General of Ohio, Indiana, and Michigan. And the other surveyors are named as surveyors of the states or territories which compose their respective districts. This designation is important as showing the view of Congress in regard to the jurisdiction of the Surveyor General ; and when taken in connection with other acts, can leave no doubt upon the mind of any one, that they authorized and required him to perform his functions within the entire territory of Michigan. This, then, is not a mere legislative construction of a previous act, but a recognition of rights, and an imposition of duties by the paramount authority. That the Surveyor General was as responsible for the duties thus imposed, as for the performance of any other duties which belonged to his office, we suppose to be unquestionable. He was then, in making surveys in the territory west of Lake Michigan, acting in the line of his duty under the sanctions of law. The surveys were required to be made by law ; the Surveyor General was instructed, by the proper authority, to cause them to be made ; and they were made accordingly, under his direction. They were made within the territory of Michigan, and that, by the concurrent views and action of the Treasury Department, and of Congress, was within the district of the Sur-

veyor General. Whether this resulted from a construction of the act of 1818, or the act of April 20, 1836, which organized the territory of Wisconsin, and extended the laws of the United States over it, or of some other act, may not be material; the fact of the exercise of jurisdiction under the direction of the law-making power is undisputed.

From these facts the question arises, whether the defendants, as sureties of Lytle, are responsible for his disbursements west of Lake Michigan.

The first bond of Lytle was dated April 23, 1835, the second, on which this suit is brought, April 29, 1836. Before the date of the first bond, and in the time of Williams, the predecessor of Lytle, contracts were made, and surveys were being executed west of the Lake. And the first report of Lytle contained requisitions for appropriations to continue those surveys, and cover expenses in making them, already incurred. There could have been no surprise to the Surveyor General, or to his sureties, that he was called upon to superintend these surveys. They constituted no inconsiderable part of his duties, as they had done those of his predecessor.

In the general appropriation law of 1837, there was appropriated "for completing the surveys, &c., in Ohio, Indiana, Michigan, and Wisconsin, \$3,040," and "for surveying of the public lands in the district composed of the States of Illinois and Missouri, \$36,000." Here, as in other cases of appropriations for surveys, the districts are designated.

The question does not arise whether the sureties are responsible for the performance of new and additional duties, imposed by law on the Surveyor General, after the date of the bond. If the Michigan territory, west of the Lake, was within the district of the Surveyor General, it is not pretended that the duties required of him did not belong to the office, when the defendants became bound as sureties. The recital in the bond stated that, "pursuant to law the President had appointed Lytle Surveyor General of the public lands,

in the State of Ohio, Indiana, and Michigan territory." And if the whole of Michigan territory was embraced in the district, then the bond does not extend beyond the law. That the entire territory was within the district appears from the action of the Treasury Department, and the authoritative action of Congress.

But it is objected, "if the territory now Wisconsin and Iowa, the latter lying west of the Mississippi river, became a part of the Surveyor General's district, by being attached to and made a part of the Michigan territory, that the same territory, by being detached, on the same principle, ceased to be a part of the district."

This consequence does by no means follow. The above territory was made a part of the Michigan territory, and, by various acts of Congress, the duties of the Surveyor General were required to be performed within the annexed territory, as a part of Michigan. Subsequently, the Wisconsin territory was established, and the Surveyor General, under the orders of the Treasury Department and the sanctions of Congress, continued to discharge his functions until, by the act of 1838, provision was made to appoint a Surveyor General for Wisconsin. In that act Congress provide that the new Surveyor "shall have authority and perform the same duties respecting the public lands and private land claims in the territory of Wisconsin, *as are now vested in and required of the Surveyor of the lands of the United States in Ohio.*" They give to the Wisconsin Surveyor, by this act, no more power over the public lands of the territory than was vested in the Surveyor General. If he had no power to make surveys in this territory, then the Surveyor of the territory received none under the act.

Where the boundary of a state or territory constitutes the Surveyor's district, and that boundary is enlarged, the argument is not without plausibility, that the district is also enlarged. But when the district thus enlarged is sanctioned

by numerous acts of legislation, and by a uniform course of the Treasury Department, for a great number of years, there would seem to be little ground for doubt on the subject. Congress had the power to require the Surveyor General to perform duties in any State or Territory, without fixing the boundary of his district. The law requiring his duties to be performed in a territory or state, makes such territory or state his district. Now, this was done, substantially, in Wisconsin territory. The law required the lands in that territory to be surveyed, to which the Indian title had been extinguished. Those lands, by the uniform action of Congress, and of the executive department, for eighteen years before the appointment of Lytle were considered within the district of the Surveyor General. No other surveyor had any jurisdiction over them. None other claimed or exercised such right, or was authorized to do so under the acts of Congress. This would seem to be conclusive as to the jurisdiction of the Surveyor General.

After the most deliberate examination of this case, and under the pressure of the executive construction of the laws, sanctioned in various forms by the legislative power, I am brought to the conclusion, contrary to my impression during the argument, that the whole of the territory of Michigan was embraced in the district of the Surveyor General; and, consequently, that the bond of the defendants is not void or inoperative, on the ground stated in the pleas. The demurrers to the pleas are, therefore, sustained.

NEWSOM v. WELLS ET AL.

Lands, by the laws of Ohio, are subject to the payment of a deceased person's debts, and where such sale has been made, under an order from the proper court, by the administration, the court will not disturb the rights of innocent purchasers, after the lapse of thirty years.

OPINION OF THE COURT.

This case is submitted to the court on bill and answer. The complainants are children and devisees of Richard Newsom, deceased, of Steubenville, who died in 1809, having an equitable interest in Lot No. 4, in said town, the legal title being held in trust for him by Bazaleel Wells.

His widow was appointed administratrix with the will annexed. On petition of the administratrix in the Common Pleas, Newsom's interest was sold to pay debts, and an order made confirming the sale and directing Wells to convey to the purchasers, Carroll and Kells. This order was made in 1812. The lot has since been subdivided and sold to numerous purchasers who are made defendants.

The bill is filed to set aside these proceedings, and declare the trust in favor of the complainants devisees alleging their disability by reason of infancy and non-residence, until within twenty-one years before suit brought.

The answer admits the original trust in Wells, Newsom's equitable estate, but sets up the order of sale to pay debts, denies the disabilities, and insists on the lapse of time and their character as bona fide purchasers, to protect their title against any irregularities in the proceedings. Their possession commenced in 1812. Bill filed Sept. 9th, 1845, thirty-three years after the sale.

That the Court of Common Pleas had a general jurisdiction to subject lands of deceased persons to pay debts, is undoubted. Under such a proceeding the lot in controversy was ordered to be sold. No want of jurisdiction in the court, or irregularity in the proceeding, is averred in the bill. The devise of the ancestor, whether expressed in the will or not, did not withdraw the land from the rights of creditors. There seems to be no ground to set aside the proceedings in this case, more than thirty years ago, except that the heirs and devisees were infants. The bill must be dismissed.

UNITED STATES v. JOHN FISHER.

Where an indictment charges the carrier of the mail with stealing a letter out of it, it is sufficient.

If the letter contain an article of value, it must be so averred in the indictment, to subject the defendant to the incurred penalty.

But as it is an offence to steal a letter which contains no article of value, it is not necessary to aver that it contained no such article.

District Attorney, for plaintiffs.

Mr. Lawrence, for defendant.

OPINION OF THE COURT.

This is an indictment against the defendant, charging him as carrier of the mail, with stealing letters, &c. A motion is made to quash certain counts in the indictment which charge the defendant with stealing a letter, without alleging that it contained no article of value. This is not necessary. A carrier of the mail is subject to a higher penalty where he steals a letter out of the mail, which contains an article of value. And when this offense is committed, the indictment must allege the letter contained an article of value, which aggravates the offense and incurs a higher penalty. But where the offense consists in stealing a letter, it may be so laid in the indictment, and the proof cannot go beyond the indictment. The motion is overruled. The evidence being heard by the jury, he was convicted and sentenced by the court.

UNITED STATES v. JAMES BURNS.

On an indictment for counterfeiting coin, the guilty participation of the defendant in the act may be inferred from proof that a quantity of spurious coin, and instruments and appliances for making it, were found in his possession. Such proof, unexplained by evidence rebutting the presumption of guilt, will be sufficient to justify a verdict of guilty.

United States v. Burns.

On the trial of such an indictment, there must be proof sustaining the averments, that the coins alleged to have been made were in the likeness and similitude of genuine coins.

If the spurious coin, from its incompleteness, or the defectiveness of its manufacture, is not fitted to deceive persons of the most ordinary caution and intelligence, the inference of a criminal intention in making it does not arise.

It is not necessary to prove, in support of a charge for making American coins, or coins made current by act of Congress, that there are genuine coins, of which, those alleged to have been made, were counterfeits. The court and jury, will take notice without proof, of the legal coins made at the mint of the United States pursuant to law, and of foreign coins made current by law.

The designation in the indictment of the coins, alleged to have been made, as coins called fifty cent pieces and twenty-five cent pieces, instead of the half dollar and the quarter dollar, by which names they are called in the act of Congress regulating the coinage of the country, is not a material variance, and will not support a motion in arrest of judgment.

One or more good counts in an indictment, though there may be some that are bad, will sustain a general verdict of guilty.

In an indictment framed on the 20th sec. of the crimes act of the 3d of March, 1825, it is not a misjoinder to add to the counts charging the making of false coin, a count for aiding and assisting in making such coins, and one for procuring them to be made.

Mr. Mason, District Attorney, for the plaintiffs.

Mr. Perry and Mr. Cushing, for the defendant.

OPINION. BY JUDGE LEAVITT.

The indictment in this case is framed under the 20th section of the act of Congress of the 3rd of March, 1825, "more effectually to provide for the punishment of certain crimes against the United States, and for other purposes." 4 U. S. Stat. 121. It is provided in this section, that "if any person or persons shall falsely make, forge, or counterfeit, or cause or procure to be falsely made or counterfeited, or willingly aid or assist in falsely making, forging, or counterfeiting any coin, in the resemblance or similitude of the gold or silver coin, which has been or may hereafter be coined at the mint of the United States; or, in the resemblance or si-

multitude of any foreign gold or silver coin, which by law now is, or may hereafter be made current in the United States, &c., he shall be deemed guilty," &c. There are six counts in the indictment: 1. Making a counterfeit silver coin of the United States, called twenty-five cents; one called fifty cents; and a foreign coin, made current by law, called five francs. 2. Making an American coin called fifty cents. 3. Making a large quantity — viz: twenty pieces of American coin called fifty cent pieces; twenty-five pieces called twenty-five cent pieces; twenty pieces foreign coin called twenty-five cent pieces; and twenty pieces of foreign coin called five francs. 4. Making ten pieces of American coin called fifty cent pieces, or half dollars. 5. Aiding and assisting some person, to the jurors unknown, in making and counterfeiting sundry coins. 6. Causing and procuring the making of false coins.

Without attempting a minute recapitulation of the evidence of all the witnesses for the prosecution, it will be sufficient to call the attention of the jury to the prominent and material facts proved. These facts are: that the defendant, some time previous to his arrest, rented a tenement on Baum street, in the city of Cincinnati, the basement of which, was occupied by himself, and one Rogers, and the other parts were rented by the defendant to other persons. In September, 1848, the witnesses Legge, Davidson, and Blackburn, having a warrant for the arrest of the defendant and the said Rogers, entered the basement room of the house referred to. They found Rogers and arrested him; the defendant was not there. The witnesses state, that in this room they found on a table, a considerable quantity of counterfeit coin, some of which was in an unfinished state. In a trunk they found a leathern bag filled with counterfeit half dollars and five franc pieces, which were finished. There was also in the room, several bars of metal, and a box containing moulds for making five franc pieces, half and quarter dollars, and half eagles. It is also proved, that on several occasions

previously to the arrest of Rogers, the defendant had purchased plaster of paris, alleging at one time, that he wanted it for dental purposes, and at another for making busts. On one occasion he purchased a box full of plaster which was put up by the witness, and the box marked by him, and which, being shown to him in court, he identified as being the same box which contained the plaster, and which was found by the officers in the room referred to, occupied by the defendant and Rogers. The defendant was subsequently arrested on the Kentucky side of the Ohio river, a short distance below the mouth of Big Sandy. When arrested he was trying to make his escape. On his person were found some counterfeit five franc, half dollar, and quarter dollar pieces. He denied that he had passed any counterfeit coin, but on being reminded of his connection with Rogers, said he had kept more of that kind of company than was good for him, and inquired if he could not be relieved from his difficulty by enlisting as a soldier in the service of the United States.

It is insisted by the counsel for the defense, that this evidence does not establish the guilty agency of the defendant, in making, or aiding to make, any of the false coin, described in the indictment. On this point, it will be sufficient to remark, that the law raises a presumption of guilt from the circumstances proved. The defendant was the lessee, and had been the actual occupant, in connection with Rogers, of the room in which a large quantity of spurious coin, and various instruments and appliances for coining were found. It is also proved that a box containing plaster of paris, purchased by the defendant, was found in the room, and when arrested, several pieces of counterfeit coin were found upon his person. These are circumstances from which, unexplained by testimony on the part of the defendant, relieving him from the suspicions and inferences otherwise arising, the jury may rightfully presume his criminal participation in making the spurious coin found in his possession.

It is also insisted in argument, that there is no proof that the coins found in the defendant's possession are in the likeness and similitude of the genuine coins, of which they are alleged to be counterfeit imitations. This is undoubtedly one of the material allegations in the indictment, which must be sustained by the evidence, to the satisfaction of the jury. It is of the essence of the crime imputed to the defendant, that he made, or assisted in making the spurious coin, with the fraudulent intent of passing it as genuine. And it is certain that no such intent can be fairly presumed, unless the coin was of a character, and in a condition to be used for purposes of fraud and imposition. It would seem from the evidence that a portion of the coin found in the defendant's room, was in an unfinished state, and therefore not prepared for use. The statute provides no punishment for the manufacture of unfinished coin; nor is that the charge exhibited against the defendant in the indictment. There was a part of the coin found by the witnesses, which was in a finished state. The precise character and appearance of the coin are not stated by the witnesses. It will be for the jury to say, whether they were so far artistically complete as to be used successfully for the purposes of deception and fraud. If, from incompleteness, or the clumsiness of the manufacture, men of very ordinary circumspection and intelligence could not be imposed on by them, there is no ground for the inference that they were designed for fraudulent use. The jury however will bear in mind that it is the object and the policy of the law, to protect all classes of community from frauds and impositions, connected with attempts to pass spurious coins. There are many whose experience and intelligence do not qualify them for a very accurate judgment of the character of coin, and such may be defrauded by it, while others of greater experience and skill in these matters would reject it without hesitation. It will be for the jury to say, whether the evidence in this case sus-

tains the averment, that the coin made by the defendant was "in the likeness and similitude of genuine coin."

It has been also suggested by counsel, that the jury cannot convict in this case, for the reason that no proof has been offered on the part of the prosecution, of the fact that there are genuine coins, of which those mentioned in the indictment are counterfeits. It was not necessary that such proof should be offered. There are some facts, of which a court and jury will take notice, without formal proof. That the coins named in the indictment as fifty cent pieces or half dollars, or as twenty-five cent pieces, are legal subdivisions of the dollar, authorized to be coined by the mint of the United States, is a fact within the judicial cognizance of this court, upon which the jury may act without evidence.

[The jury returned a general verdict of guilty.]

[On a subsequent day of the term, the counsel for the defense filed a motion in arrest of judgment. Judge McLean was not present at the argument of this motion. It was overruled by Judge Leavitt for reasons substantially as follows:]

The first five of the numerous grounds stated in the motion in arrest of judgment, filed in this case, are based on technical exceptions to the caption of the indictment. These may be summarily stated as follows:—That the caption does not state when or where the indictment was found; or, the names of the jurors by whom it was found, nor the place from whence they came; or, that they were good and lawful men; or, that the venire was duly served and returned. These exceptions do not call for special consideration, and may be disposed of by the remark, that the form of the caption of the indictment is in strict accordance with the forms used in this court, from its organization. There seems to be no ground for a doubt as to its sufficiency.

The court will, therefore, proceed to notice the other reasons urged in support of this motion. The first and most

prominent of these is, that the indictment charges no crime under the statute.

It is urged in support of this ground, that the first three counts of the indictment, charging the act of making counterfeit coins, describe the coins made as *fifty cent*, and *twenty-five cent pieces*, and are fatally defective in not designating these coins by the names used in the statute authorizing their coinage by the mint of the United States. It is true, the names used in those counts of the indictment, descriptive of the coins, are not verbally identical with those used in the statute. The 9th section of the act of Congress of April 2, 1792, for "establishing a mint, and regulating the coins of the United States," (1 vol. United States Laws, 248,) authorizes, among other coins, the coinage of dollars, to be of the value of the Spanish milled dollar; "*half dollars*," to be half the value of the dollar; and "*quarter dollars*," to be one-fourth the value of the dollar. Is it essential that these terms should be used in the indictment, as designating the coin alleged to have been counterfeited? In the view of the court, this discrepancy is not a material variance.

If the section of the statute, under which this indictment is framed, specifically designates by name the various coins, for the fraudulent making of which it provides a penalty, there would be a strong show of reason for insisting on the use of the precise terms of the statute. But the section referred to, provides in general terms for the crime of counterfeiting the gold and silver coins of the country, and foreign coins made current by law, without naming them. The fact, that in the act regulating the coinage of the country, the pieces of coin charged in the indictment to have been forged, are designated by names different from those used in the indictment, if those names are pertinent, and of equivalent meaning, affords no sufficient ground for arresting the judgment. The gist of the crime consists in the fraudulent making of false coin. In charging the crime in the indictment,

it is necessary to describe specifically, by name and denomination, the coin alleged to have been made. But there is no principle requiring that the precise terms used in the statute, should be used in the indictment. If equivalent terms are used—terms popularly and universally known and understood as identical with those in the indictment—it will be sufficient. Now these parts of a dollar, described in the indictment as pieces called *fifty cents*, and *twenty-five cents*, are as accurately designated, and as well understood, by those terms, as if they had been called the *half dollar*, and the *quarter dollar*. And the court and jury will take notice, without proof, that a *fifty cent piece*, or a *twenty-five cent piece*, is identical in its meaning and import with the half dollar, and the quarter dollar, respectively. Any other view of this question, would involve a strictness and rigidity of construction, not required by any established principle of criminal law, and violative of the plain teachings of common sense. It is true, that great certainty and precision are required in setting out a criminal charge in an indictment. But, in stating this as an admitted rule in the administration of criminal law, the reason on which it is based should be kept in view. That reason obviously is, that the accused may know with certainty the specific crime for which he is arraigned, and enjoy the most ample privilege of meeting and repelling the charge. It is not perceived that the conclusion here announced, can, by possibility, restrict or infringe upon this right. True, the precise words used in the statute, are not used in the indictment; but those used in the latter, are of equivalent and identical import with those in the statute. It is impossible that the defendant could be misled by the use of these terms, or that they could offer any hindrance in the preparation of his defense.

But if the court entertained an opinion different from that here announced, on the point under consideration, it would afford no ground for arresting the judgment in this case.

The exception referred to applies only to the first three counts. In the fourth count, the charge set out, is, the making sundry pieces of American coin, called fifty cent pieces, or *half dollars*." Here the term used in the statute before referred to, regulating the coinage, is used in the indictment. That in the designation of the coin, the alternative form of expression is adopted, constitutes no objection to the count. If this count is good, though the others should be adjudged bad, the verdict of guilty is sustained. This is now understood to be the doctrine sanctioned in the American courts, if not elsewhere. It has heretofore received the approval of this court. In the case of *The United States v. Burroughs*, reported in the 3rd of McLean's Reports, page 405, Judge McLean, in giving his opinion on a motion in arrest of judgment says:—"If the first count be bad, there being other counts in the indictment which are good, on a general verdict of guilty, the judgment can not be arrested. In this, an indictment differs from a declaration. For one defective count in the latter, the judgment must be arrested; while in the former, one good count sustains the verdict."

This view disposes of the motion in arrest. There is, however, another point insisted on in support of the motion, which it may be well to notice. This point is, that there is a misjoinder of offences in the indictment, that calls for the arrest of the judgment. The alleged misjoinder consists in uniting with the counts charging the defendant with making false coins, the distinct offences of *aiding and assisting* some other person in such making, and *causing and procuring* some other person to make such coins. These are set forth respectively, in the 5th and 6th counts. The rule in relation to the joinder of distinct offences in different counts of the same indictment, is well settled. The test is, that the judgment be the same for each offence. *Roscoe's Cr. Ev.*, 216. Now the crimes charged in all the counts of this indictment, are embraced in the same section of the statute, and the same

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judgment follows each. There is, therefore, clearly, no misjoinder.

[The motion in arrest being overruled, judgment was entered on the verdict, that the defendant be confined in the penitentiary, at hard labor, for five years.]

R. M. BARTLETT v. CRITTENDEN ET AL.

An author has a common law right in his manuscript, and is entitled to an injunction to restrain the publication of it.

But when the work is published, the author has not, by the common law, an exclusive right to re-publish it.

Since the statute of Anne, the author has no exclusive right to republish his work in England.

The first publication is a dedication of the work to the public.

The common law gives protection to the author for his manuscript only.

But the 9th section of the Copyright Act of 1831, also protects the author's right to his manuscript.

The whole of the manuscript need not be printed. If a substantial part of it be taken, chancery will enjoin its publication, on the application of the author, or his legal representatives.

The novelty of a work on book-keeping, must necessarily consist in the plan or mode of keeping accounts. The items of debt and credit are only used to illustrate the principle of the work.

Private letters are within the statute, and their publication will be restrained.

The author's property in the manuscripts may be transferred, or abandoned, like any other right of property.

Walker & Kebler for complainant.

Storer & Gwynne for respondents.

OPINION OF THE COURT.

This bill is brought to protect the copyright of the complainant, in a manuscript work on book-keeping, of which he claims to be the author; and the defendant is alleged to have published a work on the same subject, which the complainant charges was copied from his manuscript.

For twelve years and upwards, the complainant has been engaged in teaching the art of keeping books, and has used his work, which is still in manuscript, in his school, with the view of rendering it more perfect, and with the intention of publishing it. The work of the defendant contains two hundred and seven pages, ninety-two of which are alleged to have been taken from the plaintiff's manuscript, with only colorable alterations.

The answers deny the allegations in the bill.

A reference was made to a Master, with special instructions, who reports, "that the book of the respondents contains a portion of plaintiff's manuscript, with only slight alterations; and he says that it is impossible that the book and the manuscript could have been composed by two persons, neither having for his guide the entries of the other. The balance sheets are the same in both. As regards the plan and arrangement, they are the same. The book contains explanations, which are valuable to the learner, that are not in the manuscript. Both works consist of a series of brief sets of mercantile books by double entry."

The Master reports, that the plan of the work in the manuscript and in print, is substantially the same; that in the book there are explanations interspersed through the series of sets, which the manuscript does not contain; that these explanations are of great use to the learner, but that they may be verbally given with equal advantage.

The system in the manuscript, the Master states, is superior to any he has seen, except that of the book published by the defendant, which is the same in substance, "that, unlike all the systems he had seen, the manuscript is made up of a few brief sets of mercantile books, which show the entire process of ordinary double entry book-keeping, and in a compass of very little magnitude;" and he says, that "he discovers in other treatises nothing bearing a resemblance

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to the manuscript plan. He therefore concludes that the plan is original."

"The manuscript, in its present state, (the Master says,) contains substantially a system of book-keeping, suitable to be used by a teacher in his school." "As the system, when published, becomes its own teacher, it should be accompanied with such precise explanations as may be necessary to a proper understanding and use of it by the uninitiated. It should also be accompanied with forms of the auxiliary books."

Jonathan Jones, of St. Louis, a witness, states, that in 1841 he opened a school in St. Louis, as the partner of the complainant, for instruction in book-keeping on Bartlett's plan, which consists "of eleven sets of books, with a balance sheet for each set, and an inventory attached, showing property on hand, and that Bartlett was the author of them; that his manuscript contains a perfect system of book-keeping, and differs from all others in arrangement, being composed of short exercises." The defendant, Crittenden, entered the school, ignorant of book-keeping; and after completing the course, he took charge of the writing department for a short time.

In 1846, Crittenden called on the witness with a copy of his work, which, on examining, the witness found to be Bartlett's system. And Crittenden then told him, that when he was in Bartlett & Co.'s School, he took a precise copy of the manuscript, with the view of publishing it; and that he did publish it in 1845. And the witness says, if all of Bartlett's manuscript were struck from Crittenden's book, there would not be enough left for a title-page. A copy of Bartlett's manuscript was used at the St. Louis School, and witness never prohibited any of the learners from copying it. Crittenden knew that it was Bartlett's manuscript, and that he intended to publish it as soon as he could make the necessary arrangements. Witness has heard Bartlett frequently

say so. Witness gave Crittenden a letter to Bartlett, referring to the published work, that Bartlett might see it.

To *Josiah Bliss*, a witness, Crittenden said, that his system was the same as Bartlett's. Nine other witnesses, who are book-keepers, being sworn, state, that Bartlett's system of book-keeping is new; and that its plan and arrangement are preferable to any other. And they say that Crittenden's book is the same in substance.

On the part of the defendant, *James T. Annan* was sworn, who says that he has been a book-keeper for fifteen years,—has examined Bartlett's system, and finds nothing new or original in it, either in the forms of stating the accounts, or in the arrangement, or in any particular; that the materials are not new in matter or form; nothing could be taught by it without rules and explanations, and auxiliary books; and that it is wholly unfit for publication; that a cash book is essential to a complete system, and that Bartlett substitutes for it a cash account. The individual who conducts the business is not named in the exhibit, and there are no indexes.

Richard Miller, who has been a book-keeper for twenty-five years, agrees with the statement of Annan, and adds, that in Bartlett's plan, there is properly no day-book, only a waste-book, from which to make the day-book entries.

John Gundry has been a book-keeper and teacher for seven years, and he agrees with Annan. He says Bartlett has more sets than usual; but he had used the same, or about the same number, more or less. Bartlett's plan contains no definition of terms, such as drafts, bills of exchange, acceptances, &c.,—no mercantile forms, such as bills receivable and payable, account of sales, account current, &c.,—no forms of calculations, viz: interest, discount, commission, equation of payments, reduction of currencies. But he says, that no work has come to his knowledge wherein the theory has been carried out to so great an extent as in Bartlett's, though many authors have recommended it. He never saw

the identical entries until the spring of 1842, when he examined Bartlett's manuscript. In 1845, witness united with Bacon to teach book-keeping, who had been using Bartlett's system, and they continue to use it in the school.

The complainant claims relief on two grounds :

1. At common law.
2. Under the act of Congress, 3d February, 1831.

In the case of *Wheaton & Donaldson v. Peters & Griggs*, 8 Peters' 655, the Supreme Court say : " That an author, at common law, has a property in his manuscript, and may obtain redress against any one who deprives him of it, or by improperly obtaining a copy, endeavors to realize a profit by its publication, cannot be doubted." And again, page 661, " An author has, by the common law, a property in his manuscript ; and there can be no doubt that the rights of an assignee of such manuscript would be protected by a Court of Chancery."

In combating the argument in the same case, that an author had a common law right to republish his own works, and to prohibit others from doing so, the court showed that after the statute of Anne there was no such right in England, and that if such right were shown to exist there, it did not follow that it exists to the same extent in Pennsylvania. That the common law in this country exists in the different States, as modified by them by statutory enactments and judicial decisions. But the question under consideration is very different from the one decided in the above case. We have to say whether the writer has a right of property in his own manuscripts. That he has such a property in his own literary labor, until he shall relinquish it by contract or by some unequivocal act, would seem to be clear. This is laid down in *M'ughon on Lit. Property*, 74 and 137 ; *Webb v. Rose*, 4 Burr, 2330 ; *Pope v. Curl*, 2 Atk. 342 ; *Munley v. Owens*, Bur. 2320 ; *Southey v. Sherwood*, 2 Meriv. 434 ; 2 *Story on Eq.*, sec. 943.

Lord Mansfield, and some others, distinguished for their

great learning and ability, have considered the publication of a work not as such a dedication of it to the public by the author at common law, as to deprive him of an exclusive right to republish it.

With the greatest respect for these opinions, we think there is a difference in principle between the right to republish a printed work, and the exclusive right of an author to publish his own manuscript. A man may write without any intention to publish. He may treat of principles and characters without restraint—with a view to his mental improvement, or from some other motive, without incurring any responsibility so long as the manuscript remains unpublished. It is, therefore, essential, in all proceedings for a libel, to prove publication. And there is no law which can compel an author to publish. No one can determine this essential matter of publication but the author. His manuscripts, however valuable, cannot, without his consent, be seized by his creditors as property. They are valueless to all the world except to the author and his representatives; or to such persons as he shall transfer them. But the author who publishes his work, dedicates it to the public. He voluntarily incurs all the responsibility of a publisher. His object is to instruct or amuse mankind, and the more his work is circulated, the greater is the compliment to his ability as a writer. There is no reason, then, against a republication of the work by any one, except that it may reduce the profits of the author. And, on this ground, he cannot complain, as he has failed to secure the right under the statute.

If the common law protects the rights of an author, as contended for, the statute was useless. An action for damages and an injunction, would as effectually protect the rights of an author, as any provisions of the statutes. But there is another view, which is still more conclusive, against the exclusive right to republish a printed work. The statute limits the right to a term of years. The common law right, if it exist, is without limitation. To hold, then, that there is a

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common law right, independently of the statute, is to disregard the statute. Whilst the common law protects the right of the author to his manuscripts, it cannot be made to extend to the republication of a published work. As well might it be contended that the inventor of a machine, after it has gone into general use, by the acts of the inventor, may, by the common law, claim the exclusive right of making and selling it.

But we think this case is within the act of Congress referred to. The § 9 of that act, 4 Peters' Stat. 438, provides : " That any person or persons who shall print or publish any manuscript whatever, without the consent of the author or legal proprietor first obtained, shall be liable to suffer, and pay to the author or proprietor, all damages occasioned by such injury, to be recovered by a special action on the case founded on this act." " And the several Courts of the United States empowered to grant injunctions to prevent the violation of the rights of authors and inventors, are hereby empowered to grant injunctions," &c.

That the complainant is the author of the manuscript in question, is proved. And it also appears, from the statement of the experts, and by the reports of the Master, that the manuscript contains a new and useful system of book-keeping. The novelty consists in the mode of keeping accounts. It can consist in nothing else. The names and figures used in the items of debit and credit, are of no importance; as they are only used to illustrate the mode or principle of the work. The manuscript was contained on different sheets or cards, for the convenience of teaching; but this is immaterial. Its parts were necessarily connected. Three or four of the witnesses state that there is no novelty in the manuscript—nothing that had not been taken from, or might not be found in different works on book-keeping. But this is contrary to the views of the witnesses generally, and, especially, to the report of the Master.

The objection that the manuscript does not contain a complete system, as explanatory notes, &c., are necessary and usual in such works, to enable the student to learn the art of book-keeping without an instructor, is not sustainable. A surreptitious publication of an important part of the manuscript, is equally within the principle of the statute. But the notes are only explanatory of the system, as contained in the body of the work. They facilitate the progress of the learner, but they add nothing to the system. From the weight of the evidence, including the Master's report, Bartlett's system may be said to be complete for the purpose of teaching. Was there a publication of the manuscript of the complainant by the defendant? He has denied in his answer, somewhat equivocally, the charge of publication, as made in the bill. He confessed to Jones, that he took a copy of the manuscript, with a view of publishing it, and that he did publish it in 1845. After the publication of his book, he admitted, to other witnesses, that the system of his work was the same as Bartlett's. It seems Crittenden became a student in the school of Bartlett and Jones, conducted by Jones at St. Louis, and in which he acquired his knowledge of book-keeping. The manuscript of Bartlett was used in that school, and it was there that the defendant made out his copy.

Independently of this proof, a comparison of the book with the manuscript, will show that at least ninety-two pages of the book were substantially copied from the manuscript. The Master says that they could not be the production of two minds. So nearly are they identical, that no one can read them without at once perceiving that one must have been copied from the other. The system is the same in both, and the discrepancies that appear only show the intent of the copyist. It is believed that there is no case in the books where the piracy is more palpable.

The inconsistency of Jones in giving a letter to Crittenden, recommending him and his book to Bartlett; is ex-

plained in his testimony. He gave the letter to bring the fact of publication to Bartlett's notice. This act of the witness, though apparently inconsistent with his statements, does not destroy his credibility. He must have known, as he states, that the book contained Bartlett's system ; but it was not for him to say, or to know, whether Crittenden, under the circumstances, was liable to an action for the publication. The facts of the case go strongly to show the probability that Crittenden told Jones, as he swears, that he copied Bartlett's manuscript.

It is argued, to bring the case within the 9th section, that the whole of any manuscript must be published ; that the principle of law in relation to colorable alterations of a printed book, or a fair abridgment of it, does not apply under this section to a manuscript. If the whole of the manuscript must be published, will the omission of a line or a word, evade the statute ? That it will, would seem to be the argument of the counsel. Under such a construction, the question might well be asked, of what value to an author is the statute ? It purports to protect him against a fraudulent use of his manuscript ; but practically it gives him no protection. It has been passed in mockery of his right. He is the sport of every man who has the disposition and the opportunity to pirate his manuscript. No such rule of construction is admissible. Has a substantial part of the manuscript been published ? Does the book of the defendant contain Bartlett's system of book-keeping ? Of this there can be no doubt. Such a publication is within the above section. It renders the manuscript valueless.

Was there an abandonment of the manuscript by Bartlett ? This is the only remaining point to be considered, and it is the one most relied on in the defence.

It satisfactorily appears from the evidence, that Bartlett intended to publish his manuscript. And this is only mate-

rial on the question of abandonment. His right of property in no way depends on his intention in this respect.

His manuscript was used in the school taught by himself in Cincinnati, and by the partnership school taught by Jones in St. Louis. In both these schools the manuscript was studied by the pupils, and they were required to copy certain parts of it, and were at liberty to copy the whole. These schools, and especially the one at Cincinnati, have been in operation several years. And under these circumstances, it is contended, there was an abandonment of the manuscript.

Bartlett's right of property in his manuscript may be transferred or abandoned, the same as any other right of property. Where the copy-right of a published work is secured, under the statute, the author, by using the work in imparting instruction to his pupils, or by disposing of it to a friend, does not thereby transfer his exclusive right to publish it, or incur a suspicion that he intends to abandon it. And how does this differ from the case under consideration? In both cases the law gives a right of property to the author, and a remedy to enforce that right. And in both cases he may transfer or abandon that right. The evidence of a transfer or abandonment must be as clear and as specific in the one case as in the other. An acquiescence in the publication of his manuscript, or in the republication of his printed book, would authorize the presumption of an assignment or of an abandonment. To make a gift of a copy of the manuscript is no more a transfer of the right or abandonment of it, than it would be a transfer or an abandonment of an exclusive right to republish, to give the copy of a printed work.

In his treatise on Equity, sec. 943, Mr. Justice Story says, "In cases of literary, scientific, and professional treatises in manuscript, it is obvious, that the author must be deemed to possess the original ownership, and be entitled to appropriate them to such uses as he shall please. Nor can he justly be deemed to intend to part with that ownership by deposit-

ing them in the possession of a third person, or by allowing a third person to take and hold a copy of them. Such acts must be deemed strictly limited, in point of right, use, and effect, to the very occasions expressed or implied, and ought not to be construed as a general gift or authority for any purposes of profit or publication, to which the receiver may choose to devote them." And he says, to prevent the publication of manuscripts, without the consent of the author, an injunction should be issued. Even the publication of private letters by the person to whom they were addressed, may be enjoined. This is done upon the ground that the writer has a right of property in his letters, and that they can only be used by the receiver for the purposes for which they were written. So far as this, and, in justification or defense, an individual has an interest in letters received by him. *Eden on Injunct.* ch. 13, p. 275, 276; *Duke of Queensbury v. Shebbeare*, 2 Eden's Rep. 329; *Southcy v. Sherwood*, 2 Meriv. Rep. 434, 436; *Mucklin v. Richards*, Ambl. 694; *Pope v. Curl*, 2 Atk. 342; *Lord Perceval v. Phipps*, 2 Ves. & Beam, 19, 24; *Gee v. Prichard*, 2 Swanst. 403, 415, 422, 425.

"No length of time will authorize the publication of an author's original manuscript without his consent." In 1804, the Court of Sessions of Scotland interdicted, at the instance of the children, the publication of the manuscript letters of the poet Burns. *Cadell & Davis v. Stewart*, 1 Bell's Com. 116 n. Lectures, oral or written, cannot be published without the consent of the lecturer, though taken down when delivered.

Manuscript reports were copied by the clerk of a gentleman, to whom the author had lent them, and the Chancellor granted an injunction to restrain the publication. *Forrester v. Waller*, 2 Eden R. 328; *Eden on Injunctions*, 322.

The Earl of Clarendon delivered to defendant's ancestor, the manuscript of the second part of his father's History of the Rebellion, with liberty to take a copy of it, and make

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what use of it he thought fit. Complainant, who was Lord Clarendon's representative, obtained an injunction from Lord Northington, who said, that it could not have been the donor's intention that the donee should print the work, though he might make every use of it except that. *Duke of Queensbury v. Shebbeare*, 2 Eden's Rep. 329.

Lord Eldon refused to grant an injunction, until the right was tried at law, where the manuscript had been in the hands of a publisher twenty-three years, and had not been called for by the plaintiff. *Southey v. Sherwood*, 2 Meriv. 435. Sparks had procured, from the representatives of Washington, the right of publishing his letters and other writings, and had done so in twelve volumes. Upham, in his *Life of Washington*, had taken many of these letters from Sparks, they never having been published before. On a bill filed, Mr. Justice Story said: "Unless there be a most unequivocal dedication of private letters and papers by the author, either to the public or some private person, I hold that the author has a property therein, and that the copy-right thereof exclusively belongs to him." And he granted an injunction. *Folsom v. Marsh*, 2 Story's Rep. 100.

The manuscript of Bartlett was used in his school at Cincinnati, and in the school at St. Louis, for the purpose of imparting instruction to the pupils, and it does not appear, from the evidence that copies were required or permitted to be taken of it for any other purpose. There is nothing in the testimony from which an implication can arise, that Bartlett consented to the publication of his manuscript by the defendant, or that he ever abandoned it. It seems he was much excited when he was informed of the publication of Crittenden, and, shortly afterwards, instituted this suit.

An injunction will be granted to restrain the defendants from a further publication of the first 92 pages of the work, or sale of it; and a reference is made to a Master to ascertain the number of copies sold, and the number on hand, &c., and that he report at the next term.

ZEBULON PARKER v. JOHN STILES.

This is an action on the case for an alleged infringement of a patent for an improvement in the application of hydraulic power, granted to Zebulon and Austin Parker, dated 19th of October, 1829, and renewed for an additional seven years from the expiration of the term of the original patent, thereby extending its duration till October 19th, 1850.

H. Stanbery, T. Walker, and H. C. Noble for plaintiff.

G. B. Smythe, N. H. Swayne, and S. Galloway, for defend't.

The particulars of the plaintiff's claim will be best understood from the instructions asked by his counsel, and substantially given by the court, which are as follows :

INSTRUCTIONS ASKED BY PLAINTIFF.

I. *As to the validity of the patent.*

1. It is the exclusive province of the court to construe the patent, and determine what the patentee claims to have invented ; and of the jury to determine whether he has in fact made, and sufficiently described the invention so claimed. And the rule of construction is very liberal in his favor, especially as to patents granted prior to the present law passed in 1836.

2. So far as the present action is concerned, the patentee claims : 1st. The improved wheel by itself. He does not claim the invention of a reaction wheel, nor of the idea of pairing or duplicating wheels upon a horizontal shaft ; but simply his improved wheel. 2d. He claims the improved method, described by him, of conducting and applying the water to the wheel. This consists of a spiral scroll block placed between two concentric cylinders. Of these, he claims this use of concentric cylinders as a distinct invention, but not the

spiral scroll block. 3d. He claims as a distinct invention, the combination of the spiral scroll block with the concentric cylinders, so as to produce the spout or sluice described by the patentee.

3. In order to sustain his claim, the plaintiff must satisfy the jury that his invention is sufficiently described. Of this they are the exclusive judges. And the test is, whether the description contained in the specification and drawings, is so full, clear, and exact, as to enable a skillful millwright to construct the machine without invention of his own.

4. The plaintiff must also satisfy the jury that he was the original and first inventor, and that his invention is useful. The test of *originality* is, that the thing invented was not before known to him. The test of *novelty* is, that the thing invented was not known to, or used by other persons in a public manner, and not described in any public work. The test of utility is, that the invention is of some utility, and not simply frivolous; but the degree of utility is not important. And of all these matters, the production of the patent is *prima facie* evidence, throwing upon the defendant the burthen of proving the contrary.

5. The claim in this case being for the invention of distinct parts of a machine, and not for a new combination of old elements, if the defendant relies upon a prior public knowledge or use, he must satisfy the jury that substantially the same parts or elements were publicly known or used in the same way before the alleged invention of the plaintiff.

6. If the defendant relies upon a prior description in some public work, he must produce a work containing such a description as would be sufficient in a patent.

II. *As to infringement.*

1. The term *principle*, as applied to machines, does not mean a philosophical principle, which is not the subject of a patent. But it means the particular method of producing a

given result by mechanical contrivance ; and where a similar result is produced in substantially the same way, there is an identity of principle, and consequently an infringement, although the mechanical contrivance may be different in form or proportions, or by the substitution of mechanical equivalents.

2. Where the invention of the plaintiff is of distinct parts of a machine, and not of a new combination of old parts, it is an infringement to use any one of those parts ; and if the defendant uses either substantially the same wheel, or substantially the same mechanical contrivances for introducing or applying the water to the wheel, he is guilty of an infringement.

3. If the jury believe that the mechanical contrivances in the Lansing machine, as used by the defendant, for introducing and applying the water to the wheel, operate in substantially the same way to produce the result, as those invented by Parker, then there is an infringement of Parker's patent. And this consequence is not avoided by simply changing the form or proportions of the machine, or by substituting one or more mechanical equivalents.

4. Supposing the Parker patent valid, the only question for the jury is, whether the spiral scroll case placed between an outer cylinder and an enlarged shaft, which may be an equivalent for an inner cylinder, produces substantially the same effect, by substantially the same mechanical contrivances, as the spiral scroll block placed between the two concentric cylinders in the Parker machine. If so, the alterations are merely colorable evasions, and there is an infringement.

The nature of the defence will perhaps best appear from the instructions asked by defendant's counsel, and which are as follows :

[The jury, by consent, were permitted to take with them in their retirement both sets of instructions.]

1. That the claims enumerated under the first head of the summary of the plaintiff's specification are: 1. "The compound vertical percussion and reaction wheel, with two, four, six, or more wheels on one horizontal shaft." This is a claim to the entire wheel described. It is not stated that any particular part of this compound wheel is claimed, nor that the combination of the whole is new. In law, therefore, the claim is for the whole compounded wheel, and also for each particular part of which it is composed, and if any particular part of this compound "turns out to be old, or the combination itself not new, the patent is void."

2. The second and third items mentioned under this head of the summary, are the concentric cylinders enclosing the shaft, and the spout with its spiral termination between them. These things are specially claimed as parts. Being so claimed, if any of them are found not to be new at the time of the plaintiff's invention, or were described in the *Dictionary of Arts and Sciences*, which is in evidence, the patent is void. (It is claimed by the plaintiff's counsel that the second and third claims of this summary entitle them to claim them *in combination*, although they are not so claimed in the specification; if the court should be of that opinion, then,) we ask the court to charge the jury,

3. That they must be satisfied that the patentees were the inventors of the entire combination. If these parts were before used in any combination less than the whole, or if the combination up to a certain point had before existed or been described in a public work, and the patentees have only added other parts to the old combination, the claim to the entire combination of these parts cannot be sustained.

4. That where the claim is for a combination of parts, the use of any of these parts less than the whole is no infringement.

5. We ask the court further to instruct the jury, that a contrivance or part of machinery, to constitute a mechani-

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cal equivalent, must be used to produce the same effect, substantially in the same way. That the names or forms of things are of little importance. To be mechanical equivalents, they must accomplish the "same purpose, object, or effect." If their forms are alike, but their effects are different, they are not equivalent.

[As there are many suits pending in the United States for the infringement of the Parker patent, (more than two hundred in Ohio alone,) we shall attempt to give a very condensed statement of the evidence.]

EVIDENCE FOR THE PLAINTIFF.

Isaac Morton testified to the admission of defendant that he was using a turning wheel, and that the model in court was a correct representation of it. Is well acquainted with the construction of water wheels. Considers that Parker's wheel is a great improvement over the old reaction wheels previously in use. That the arrangement of the concentric cylinders and the spiral terminating spout, are new and useful improvements. Had never seen these improvements before the date of Parker's patent. The object and effect of them are to apply the water to the wheel in the line of motion, and at as great a distance as possible from the centre—giving it greater leverage. Has used the old reaction wheel and Parker's improvement—find a gain of twenty per cent. in the latter over the former. Can saw as much with a Parker's with six feet head, as with the old reaction wheel with nine feet head of water. The scroll keeps the water up to its work, by diminishing in volume as the water is expended. The application of the water to the wheel in the Lansing wheel, is substantially the same as Parker's. Lansing's will do more work with the scroll than without it. The scroll is an improvement to the action of both wheels.

James Sloan.—I have followed the millwright business twenty-seven years. Have made many experiments in the application of hydraulic power. I consider the improve-

ments of Parker in the wheel, and in the method of applying the water, to be original with him, and of great service. There is a gain in Parker's of twenty per cent. over the old reaction wheels. Lansing's scroll is the same in principle as Parker's—has the same effect. The water impinges upon all the buckets at the same time, by means of substantially the same contrivance. The enlarged shaft in Lansing's is a mechanical equivalent for the inner cylinder of Parker's.

Dr. Thomas G. Clinton. I have been a member of the Examining Corps in the Patent Office. The class of water wheels was within my supervision. I have examined Parker's patent in the office—applications were frequently rejected upon it. I saw Lansing's patent there. The points of novelty in Parker's wheel are the narrowed rim, and the method of forming the heels and points of the buckets of area of circles, making the issues tangential. The concentric cylinders and the wedge-shaped scroll are novelties. The water passing between the cylinders acquires a vertical motion, and the scroll diminishing in its violence by approaching the face of the wheel, keeps it up to its work. The water is applied in the most economical and efficient manner.

Lansing's wheel is enclosed in a spiral scroll shute, which is made to traverse round and approach its outer verge. It is substantially the same as that of Parker's in intention and operation. The vertical motion would not be so perfect without the inner cylinder, nor could the water be so economically applied without the scroll. The part of the wheel to which the helix is applied makes no substantial difference.

Edward H. Knight. I am a Patent Agent, and have examined water wheels in the Patent Office and elsewhere. I have examined the Parker patent, and seen the wheel in operation. The water is let on from a sluice between concentric cylinders. The outer cylinder gives it a vertical mo-

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tion, and the inner cylinder keeping it from the centre gives it greater effect. The scroll which winds round between the cylinders gradually approaches the face of the wheel, directs the water towards the wheel, and, diminishing in volume as it passes round, in proportion as the volume of water is diminished by passing through the issues, keeps the remainder up to its work, causing the water to press equally upon the whole circumference of buckets. In the wheel there are points of novelty in the rim, the buckets, and the issue, which have been before explained.

The method of applying the water in Lansing's is substantially the same, the effect on the oblique buckets identical. The scroll shute which winds round the wheel has the effect of keeping the diminishing volume of water up to its work as the scroll in Parker's, and also of giving the vertical motion which is the duty of the outer cylinder in Parker's. The enlarged shaft in Lansing's performs the office of the inner cylinder of Parker's. The spiral is identical in its effect in both, and there are in Lansing's mechanical equivalents for the inner and outer cylinders of Parker's. Economy is secured by the use of the scroll.

Jesse J. Cail testified to the fact that defendant had told him that the Lansing wheel would do double the work of the flutter wheel, under same head.

FOR THE DEFENDANT.

Clark Williams. I have been engaged in the practical application of hydraulic power. The principal power in Parker's wheel is reaction, caused by destroying the equilibrium of pressure in the wheel. The Toulouse wheel exhibited, involves the same principles of action as Parker's—that is, they are both reaction. The issues and discharge are different. Parker's is superior in that respect. The introduction of the scroll block is an improvement, by prevent-

ing disturbing currents. It preserves the current in its proper place, does not accelerate it. There is little or no percussion in the wheel. There is a whirling motion produced in the Toulouse similar to that in the Parker wheel, the scroll having the same effect as Parker's outer cylinder. Lansing's scroll has the same effect as the cylinder in the Toulouse in producing a vertical motion, and as the scroll in Parker's in diminishing in volume and preventing disturbing currents. The scroll block is of no service with a vertical shaft. There is no vertical motion in the cylinder when the wheel is full. Lansing and Parker have spiral scrolls for bringing up the diminishing volume of water to different surfaces for the same purpose. The power of reaction is sufficient to account for the motion of Parker's wheel.

Dr. Chartres. I have had in former years some practical experience in millwrighting. In Parker's wheel and method of applying the water, the scroll is injurious, for it creates greater friction. There is no value in the inner cylinders—they have no effect in directing the water. The Parker wheel is the best wheel exhibited; in its mechanical construction it is much superior. The application of the scroll in Parker's and Lansing's only differs in the part of the wheel to which it is applied—to the periphery of one and the face of the other; it has the same good effect and the same evils in both. Parker's is the best. Were the scroll removed from the Parker wheel, it would be similar to the Vermont wheel as exhibited by model. A square forebay is as good as a cylinder. The inner cylinder is new, but the wheel is the only valuable part of Parker's invention.

[Several witnesses deposed to the existence of several pairs of wheels on a horizontal shaft, prior to the issuing of Parker's patent. And this was admitted by plaintiff's counsel, in relation to wheels constructed by Roswell Wilcox.]

Russel Bradley. In 1825 or '26, I saw several cast iron reacting wheels placed on a horizontal shaft, in a mill at Willesden, Chittenden county, Vermont. I constructed the

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model exhibited in court. The gate was not hoisted, and I could not see the interior of the case between the wheels. I have shown several things in the model that I did not see, and suppose them to be correct. I guessed at a great part of it. It was a new wheel. I did not examine it closely. I have guessed the whole interior arrangement; I did not look in.

John Pope testified to having seen two wheels on a horizontal shaft with a water split between them, in the year 1818, in Morgan county, Ohio. The case between the wheels was cylindrical, and the water was introduced under the shaft; the half of the cylinder over the shaft was solid, not admitting the water, which only filled the buckets as they came round to the lower half of the case.

Christopher Amack testified to having seen in 1824 or '25, near Eldridge, Onondaga county, New York, a scroll round a wheel on a vertical shaft with radial floats, like an inverted flutter wheel—described it as similar to Lansing's.

[Several millwrights testified that they considered the scroll block injurious, and others that it had no effect, and might be reversed without alteration in the power of the wheel, and others as to the power attainable by the different methods of applying the water, overshot, undershot, reaction, &c., &c.]

PLAINTIFF REBUTTING.

Dr. T. G. Clinton, recalled. I have examined the Toulouse, Vermont, New York, and Parker wheels. There is a slight resemblance, but a substantial difference. The tendency to a vertical motion in the Toulouse is very imperfect—there are eddies produced; the action is principally by percussion. There is no vertical motion in the Vermont wheel; the water is admitted under and over shaft.

James Sloan. I have experimented with and without scroll. I obtained a co-efficient of 64.3 per cent. without, and 71 with the scroll; the old reaction gave 50.3. On reversing the scroll I obtained .02. There is a substantial difference

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between the Vermont and Toulouse wheels, and Parker's. Neither of the former have an inner cylinder nor a scroll. I always, in putting in wheels, use the scroll. A wheel is loaded when more water is let on to a wheel than the issues require.

Edward H. Knight. I consider that there is a substantial difference in the application of the water, in the Vermont, Toulouse, and the Parker wheels. There can be no vertical motion in the Vermont wheel, due to the method of applying the water,—whatever motion may exist is produced by the wheel, and is a waste of power. In Parker's the vertical motion is produced for the purpose of more effectually applying the power of the water; while in the other the wheel is made to keep a body of water whirling round. Though water in a state of quiescence presses equally in all directions, water in motion presses with greater power upon surfaces placed across its line of motion, than surfaces parallel to it. There is in the application of the water and in Parker's wheel, a power over and above what is due to reaction, derived from the impingement of the water with a momentum due to its velocity, upon the buckets placed obliquely in its line of motion. It may be called percussion. I see no reason to quarrel with the term.

[Several millwrights were called, who testified that they used the scroll, and that when carefully put in, it very materially assisted in driving the wheel, and that by it great economy of water was attained.]

Judge LEAVITT charged the jury substantially as follows :

The plaintiff, under a patent issued originally to Zebulon Parker and Austin E. Parker, dated the 19th of October, 1829, and renewed in the name of Zebulon Parker, October 19, 1843, claims an exclusive right to an improvement in the application of hydraulic power to a water wheel, and seeks to recover in this action, for an alleged infringement of that right, by the defendant, in the use of a water wheel, known

as the Lansing wheel. It is the duty of the court, by a fair construction of the patent, to decide, whether in all substantial particulars, it conforms to the requisites of the law. And it is now a principle, settled by the concurrent opinions of some of the most enlightened jurists of this country, that patents, securing to inventors the just rewards of their labor and industry, are to be construed liberally, and with a fair purpose of carrying out the object of the constitutional provision on this subject, and the legislation of Congress based upon it. It is now justly held, that these exclusive rights are not to be viewed in the light of odious monopolies, but as the result of a policy, at once beneficent and wise. The Constitution of the United States (Art. I. Sec. 8,) has conferred on Congress, among other delegations of power, the right to pass laws "to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." And Congress, in the exercise of the power thus granted, have from time to time passed laws on this subject, designed to give practical effect to the constitutional provision. At this day, there are probably few who doubt the justness and wisdom of this policy. That it has been followed with good results, in stimulating our countrymen to intellectual effort, and has thereby contributed essentially to our rapid national advance in "science and the useful arts," is too clear for controversy.

Without extending this view, I proceed at once to the inquiry, whether the plaintiff in his patent and specification, has so far complied with the provisions of the patent law, as to be entitled to the benefits of the invention which he claims. If this invention is not described with reasonable certainty and precision, the patentee can claim nothing under his patent. The statute requires, "that before any inventor shall receive a patent for any such new invention or discovery, he shall deliver a written description of his invention

or discovery, in such full, clear, and exact terms, avoiding unnecessary prolixity, as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, or compound the same." The object of this provision is two-fold: 1. That when the term, for which the patentee has enjoyed an exclusive right, has expired, and his invention becomes the property of the public, such means of information may be accessible through the records of the Patent Office, as will enable others to avail themselves of its benefits: and, 2. That while the patent is in force, others may be informed of the precise claim of the patentee, and may not ignorantly infringe his exclusive right.

The first question for the decision of the court is, whether, on the face of the patent, this statute requisite has been substantially complied with. But as it is not contended by the counsel for the defense, that the patent, in the particular referred to, is defective, it will not be necessary to examine minutely the claims in this patent, with a view to the question, whether it is so "full, clear, and exact" in its specifications, as to answer the demands of the statute. It is sufficient to observe here, that it is a claim for a discovery of several improvements, claimed as original, in the application of hydraulic power to the propulsion of the water wheel. Its specifications appear to be minute and practical. It is for the jury to decide, whether from the evidence they are sufficiently so, to enable a skillful mechanic to construct the thing which is described.

But, it is insisted that this patent is void, on the ground that the patentee in the exhibition of his invention, has not distinguished between what is his own, and what was before known and in use. And it is quite clear, if the patentee has claimed any thing, as a material part of his combination, as new and original with him, which is proved to have been discovered prior to the emanation of his patent, it is fatal to it.

The statute requires the patentee particularly to "specify and point out the part, improvement, or combination, which he claims as his own invention or discovery." The object of this provision is to prevent any one from claiming as his own invention, that which was not new. It would be obviously unjust, and in contravention of the spirit and design of the patent laws, that an inventor should be protected by a patent, in the exclusive enjoyment of what was not his own, and that others should be restricted in the use of what rightfully belonged to the public. It is true, the statute provides, in case a patentee, unintentionally, and without any fraudulent purpose, claims as a part of his invention what is not original, being apprized of the fact, he may disclaim for such part, if such disclaimer be made within a reasonable time, and may still recover for the infringement of such parts of what is claimed in his specifications, as shall appear to be original. In this case, no such disclaimer has been entered; and, if the objection above stated exists, the plaintiff cannot recover, even if the jury are satisfied the defendant has infringed the parts of the plaintiff's invention that are original. This, I understand to be the law, as settled by the adjudication of some of the most respected judicial tribunals of the country.

It is an important inquiry therefore in this case, whether the plaintiff in his claim has embraced more than his invention. It is insisted his patent is obnoxious to this objection in three particulars: *First*, that he claims the arrangement of two, four, six, or more wheels, on a horizontal shaft; *Second*, the concentric cylinders, enclosing the shaft; and, *Third*, the spout conducting the water to the wheel, with its spiral termination.

It has already been noticed as a correct general principle, applicable to the construction of patents, that they are to be interpreted liberally. It is also well settled, that the whole instrument—that is, the patent, embracing the specification

and drawings—is to be taken together; and, if from this, “the exact nature and extent of the claim made by the inventor can be perceived, the court is bound to adopt that interpretation, and to give it full effect.”

The first point of the inquiry is, whether the patentee has claimed the arrangement of the wheels, on a horizontal shaft, as a part of his invention. To arrive at a just conclusion on this head, it will be necessary to examine with some minuteness, different parts of the instrument before the court. And, it is material to notice, in the first place, that the general character of the patentees' invention, as set forth in the patent itself, is declared to be, “a new and useful improvement in the application of hydraulic power.” In his specification and claim, he describes minutely the several inventions or improvements, by which he proposes to accomplish that end, all of which he claims as original. In the prefatory part of the specification, the invention of the patentee is said to consist of “a new and useful improvement in the application of hydraulic power, by a method of combining percussion with reaction, applied and exemplified in: 1. A compound vertical percussion and reaction water wheel, for saw mills and other purposes, with the method of applying the water on the same. 2. An improved horizontal reaction water wheel, with the method of combining percussion with reaction on it. 3. A method of combining percussion with reaction, on common reaction wheels, or those already in use.” It is then stated, that “the *principle* upon which this improvement is founded, is that of producing a vortex within reaction wheels, which by its centrifugal force, powerfully accelerates the velocity of the wheel, and adds proportionally to its momentum.” Thus far, the great purpose of the invention—namely, the application of hydraulic power to the propulsion of water wheels, by a new and improved method—is distinctly and intelligibly exhibited. The patentee then proceeds, under three distinct heads,

corresponding with those above stated, at great length, minutely to set forth the modes and appliances by which the object of his invention is to be effected. In the beginning of the first division of these specific directions, it is stated that "the compound vertical percussion and reaction wheel has two, four, or more reaction wheels, on a horizontal shaft, made of iron or wood," &c. In the conclusion of the specification, the patentees say, "The parts of the above described machinery, claimed as original, and our invention, in all their necessary dimensions and proportions, and for the use of which we seek an exclusive privilege, are as follows, to wit: 1. The compound vertical percussion and reaction wheel, for saw mills and other purposes, with two, four, six, or more wheels on one horizontal shaft. The concentric cylinders enclosing the shaft, and the manner of supporting them. The spouts which conduct the water into the wheels from the pentstock, with their spiral terminations between the cylinders. 2. The improvement in the reaction wheel by making the buckets as thin at both ends as they can safely be made, and the rim no wider than sufficient to cover them. The inner concentric cylinder. The spout that directs the water into the wheel, and the spiral termination of the spout between the cylinders. 3. The rim and blocks or planks that form the apertures into the wheels, and the manner of forming the apertures. The conical covering on the blocks," &c.

Under the first of the foregoing heads, construing its language in connection with the prefatory part of the specification above cited, it is clear the claim intended to be made, was that of the wheel called the compound vertical percussion and reaction wheel; the concentric cylinders enclosing the shaft, and the manner of supporting them; and the spouts which conduct the water to the wheel. It cannot be held to embrace the arrangement, or duplication of wheels, on a horizontal shaft, as a part of the invention of the patentees. This arrangement is introduced, and perhaps

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unnecessarily, as descriptive or explanatory of the mode by which the wheels were to be used, but not as a part of the invention. I think this construction is obvious from several considerations. *First.* The wheels are described as compound *vertical* percussion and reaction wheels; and I suppose it to be a self-evident mechanical truth, that a wheel, vertical in its position, could be no otherwise used than by attaching it to a horizontal shaft. And, it is scarcely possible to conceive it was intended to claim such arrangement, whether the wheels consist of two, four, six, or more, as an original invention. *Second.* If it was intended to claim this arrangement as a distinct discovery, by analogy to the manner in which the other improvements are stated, it would have been separately set forth as such, and not as a mere incident to the claim of the improved wheels. *Third.* The arrangement of the wheels on the shaft, has no necessary connection with the improvement of the wheels and the consummation of the general object of the patentees' invention, announced in the patent to be, "a new and useful improvement in the application of hydraulic power."

Again: It is laid down as a rule for the construction of specifications, that the language used is to be so received, as consistently with its fair import, "will make the claim co-extensive with the actual discovery." "So that a patentee, unless his language necessarily imports a claim of things in use, will be presumed not to intend to claim things which he must know to be in use." *Curtis on Pats.* §132. Now the arrangement of wheels on a horizontal shaft has been long known and used; nor can it be presumed that these patentees were ignorant of that fact, and intended to claim it as new.

Upon the whole, I entertain a clear conviction that the arrangement of the wheels on a horizontal shaft, is not, by a fair construction of the specification, to be viewed as a part of the invention claimed by the patentees.

It is also insisted, that the concentric cylinders enclosing the shaft, and the spiral conductors for leading the water to the wheels, are claimed as parts of the patentees' invention, and that the proof is, they are not original with them. It is contended that the evidence in the case shows, that these mechanical contrivances are the same substantially as those used in the Toulouse mills; the description and model of which is in possession of the jury. That the matters stated above, are within the claims of the patent, seems not to admit of doubt; and it is for the jury to say, whether there is evidence that they were before known and used.

Having disposed of these points, I will, with as much brevity as possible, state my views of some other principles of law, applicable to the case before the jury. And in the first place, to entitle the plaintiff to recover in this action, the jury must be satisfied that the invention embraced in the plaintiff's patent is "new and useful." This is a statutory requisite, and lies at the foundation of the plaintiff's right to a verdict at the hands of this jury. The patent, however, raises the presumption of the novelty and utility of the plaintiff's invention. Before a patent can issue, the person applying for it is required to make oath, that he is, as he verily believes, "the original and first inventor or discoverer" of the improvement, or invention, for which he seeks a patent. And it has been held, that this oath, constituting as it does a part of the letters patent, and being in evidence to the jury, forms a legal ground for the presumption of the novelty and originality of the patentees' claim, until the contrary be proved. Upon this inquiry, the burden of proof is thrown upon the defendant; it being the province of the court to decide what constitutes novelty, and of the jury to determine, from the evidence adduced, whether the patentees' invention is new. The same remarks apply also to the subject of the utility of the invention.

The statute requires, that the patentee should have been the original and first inventor. If the invention, which is the subject of the patent, had been previously known or used, or had been described in any public work, or had been in public use, it is not patentable, and no exclusive right would be conferred on the patentee. In a word, it must have been original with the inventor, and not known to others. The only exception to this rule, under our patent law, exists in the case of an individual obtaining a patent, believing the invention to have been original with him, and it is made to appear, it had been *known* in a *foreign* country, but not patented there, nor described in any written publication. This proof, in the case supposed, would not vitiate the patent.

The want of novelty in this case, constitutes one of the grounds of defense. It is insisted, that the plaintiff's water wheel, with the mode of applying the water, has been long known and used. And proof is adduced, that before the emanation of the plaintiff's patent, structures and mechanical contrivances alleged to be substantially identical with those of the patentee, were known and in use in France, and also in several of the States of this Union. I do not propose to examine the evidence on this point, as it will be for the jury to decide on its force and conclusiveness. It may not be improper to remark, however, that where the defense that a mechanical contrivance claimed to be essentially similar to that covered by the plaintiff's claim, is set up, and the proof relied on, is a description of such structure, contained in a printed publication, such description must have been sufficiently full and precise to have enabled a mechanic to construct it; and must also have been, in all material respects, like that covered by, or described in, the plaintiff's patent. The jury have the evidence, in the models exhibited, and the oral testimony of witnesses on this point; and it

will be their province to decide it. I pass from it with the single remark, that proof of the previous use of a structure, bearing some resemblance in some respects to the improvement of the plaintiff, and which might have been suggestive of ideas, or have led to experiments, resulting in the discovery and completion of his improvement, will not invalidate his claim, under his patent.

On the subject of the utility of the invention patented to the plaintiff, it is only necessary to say, that it must be proved to be, to some extent, useful. But courts are not rigid and strict on this point. In the absence of proof by the defendant, that the thing patented is absolutely frivolous and worthless, the presumption of utility raised by the patent itself, would be sufficient, so far as this point is concerned, to sustain the patent. The jury probably will have no difficulty on this subject, as there is positive proof by competent witnesses, that the plaintiff's improvement is valuable.

If the jury should come to the conclusion that the plaintiff's patent embraces a patentable subject, within the principles stated by the court, they will proceed to the inquiry, whether the defendant has infringed the plaintiff's exclusive right, in the use of what is called the Lansing wheel, with its fixtures ; a model of which is before the jury, and which they will have with them in their retirement.

On the question of infringement, the burden of proof is with the plaintiff. He must make it appear, to the satisfaction of the jury, that the defendant has violated the exclusive right granted by his patent. And in order to make out the fact of infringement, the plaintiff must prove that the defendant has used his invention, either in the precise form in which it is constructed under the patent, or, in a form, and on principles, substantially the same. To constitute this identity, and to make out the fact of infringement, it is not necessary that the structure or machine used by the defendant, should be the same in appearance, form, or pro-

portions, as that invented and patented by the plaintiff. It has been well said by a distinguished Judge in this country, that "simply changing the form or proportion of a machine, shall not be deemed a new discovery." If the operative principle of the two machines be the same, the substantial identity contemplated by the patent law, is established. The learned Judge, who, when present, is the presiding Judge of this court, has very lucidly defined the principle of a machine to be, "the particular means of producing a given result, by a mechanical contrivance." It is obvious, if by a mere colorable difference in form or structure, a patented machine or invention can be infringed, a patentee has no security for his rights; nor would it be possible to carry out the great ends of our patent right system. In most cases, the patentee, whatever may have been the amount of patient thought and toil employed in the completion of an invention, and however useful and meritorious it might be, would fail to receive and enjoy the just rewards of his efforts.

In this case, it is insisted that the defendant, by the use of what are designated as mechanical equivalents in the structure used by him, has infringed the rights of the plaintiff. On this subject, I shall succeed in stating my views to the jury, in a more intelligible manner than by any other method, by quoting from a learned work on the law of patent rights, lately published. In this work the author says, the true question is, (referring to the identity of mechanical structures,) "whether under a variation of form, or by the use of a thing bearing a different name, the defendant accomplishes the same purpose as that accomplished by the patentee in his contrivance." The same writer also remarks, "that there may be different modes of obtaining the same object; and if, after a patent has been obtained for a particular thing, another person, without borrowing from that patent, has invented a mode of accomplishing the same thing, he will be entitled to a patent, and would not infringe the rights of the previous patentee."

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The question of the identity of the invention embraced in the plaintiff's patent, and that used by the defendant, is to be decided by the jury upon the evidence. That evidence consists in the models of the structures, which are exhibited to the jury, and in the opinions of the experts, who have given their testimony on this point. I do not propose to detain the jury with any remarks relating to the identity of these structures. The jury, by the inspection of the models, and the testimony of the experts, will doubtless be able to arrive at a satisfactory conclusion on this point. I will here, however, observe, that great respect is due to the views and opinions of scientific individuals, and practical mechanics, on the question of the identity of different mechanical structures. From their acquaintance with the elements of mechanical science, they are enabled satisfactorily to decide this question, while to others, it might seem involved in obscurity and doubt. The jury have the testimony of several unimpeachable witnesses examined as experts in this case, to whose opinions, I doubt not, they will be disposed to give due weight.

The jury returned a verdict for the plaintiff, assessing the damages at \$150.

PETER DRISKELL v. FRANCIS D. PARISH.

To sustain the allegation of hindering or obstructing the arrest of a fugitive from labor under the Act of Congress of February 12, 1793, some act of interference, on the part of the defendant, must be proved, tending to impair the right of recaption, secured by the Statute.

The Statute imposes no obligation on any one, to aid in the recaption of such fugitive; and the penalties of the Act of Congress are not incurred, by one who is merely passive, in the attempt of the owner or his agent, to arrest the alleged fugitive.

An inquiry, made in good faith, as to the authority by which the arrest is sought to be made, is not a violation of the Act of Congress. Neither are the penalties of the act incurred by insisting that the person claimed as a

fugitive shall have a fair trial, on the question, whether such person is a fugitive.

It is not necessary, to constitute a hindrance or obstruction, within the meaning of the act, that force or violence should be resorted to, to defeat the arrest.

The refusal to permit an arrest on the premises of another, after notice that the person sought to be arrested is a fugitive from labor, and a demand of permission to arrest such person, is a hindrance or obstruction.

The withdrawal or removal of the alleged fugitive, by the order or direction of another, so as to prevent an arrest, is a hindrance and obstruction.

The person seeking to make the arrest is under no obligation to commit a trespass, or breach of the peace, in carrying out his purpose to arrest.

Under the count for harboring or concealing, it must appear that the harboring or concealing was with the intention to elude the claim of the owner of the alleged fugitive.

A temporary shelter afforded to a fugitive, without any design to conceal him or her from the pursuit of the owner, or his agent, is not a harboring or concealing, within the meaning of the act.

OPINION OF JUDGE LEAVITT.

This was an action in the case, brought under the last clause of the Act of Congress of 1793. The allegations of the declaration are, in substance, that Jane Garretson and Harrison Garretson, being the slaves of plaintiff, residing in the State of Kentucky, escaped from his service into the State of Ohio—and, that the defendant hindered or obstructed the plaintiff's agent in the arrest of the slaves: also, that he harbored and concealed them, &c. The plea was, not guilty.

Mr. H. Stanbery and H. C. Noble, for plaintiff.

Judge Lane, Mr. T. Corwin, and Mr. J. W. Andrews, for defendant.

The evidence in behalf of the plaintiff, was as follows:

Col. Charles S. Mitchell. He states, that the persons named in the declaration were the slaves of the plaintiff, who resides in Mason county, in the State of Kentucky—that they were on his plantation in that county, in October, 1844, and that about that time, they disappeared, and have not been in the plaintiff's possession since. In February, 1845

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witness was employed by plaintiff, under a written power of attorney for that purpose, to go in pursuit of the slaves, in company with A. J. Driskell, a son of the plaintiff. They reached Sandusky City, in the State of Ohio, the latter part of February, and ascertained that the two persons referred to, together with some other slaves, belonging to the same family, were in that place. About 12 o'clock, noon, they proceeded to the residence of the defendant—had passed the house a short distance, when they saw defendant coming out of the gate, opening from the front yard, into the street. The witness inquired of him, if two colored persons, Jane Garretson, and her little boy, Harrison, were at his house. Defendant said they were. Witness then asked if he could see them—to which defendant replied, he could, if they wished it. Defendant went into the house, and returned shortly after, with the woman; she standing near the defendant, on the front porch or portico, and witness and Driskell, being outside the gate, in the street. The woman recognized the witness and Driskell, and some conversation took place between them respecting the family of plaintiff. Witness then requested to see the boy, who was also brought out, and stood on the portico. He smiled, and seemed also to recognize Mitchell and Driskell, and was coming forward as if to shake hands with them. Mitchell said, let the little fellow come and shake hands with me; but defendant interposed, saying it was not necessary to shake hands with the gentleman. Mitchell then stated to the defendant, that the woman and boy were the slaves of Peter Driskell, of Kentucky; that he was there, as his agent, to reclaim them; and that he demanded the privilege of arresting them. Defendant asked, by what authority—to which witness replied, by a power of attorney; at the same time putting his hand to his pocket, and offering to produce it. Defendant said, you need not show it, as nothing but judicial authority will do; saying also, that witness could not arrest the negroes there.

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He then, by a motion of his hand, directed the woman and boy to go into the house. They went in, and the defendant immediately followed them, shutting the door after him, and leaving witness and Driskell standing in the street. Witness never saw the slaves afterwards. Understood from defendant, in the course of the riot trial, that they left his house in the evening or night of the day on which the interview, mentioned by the witness, took place.

A. J. Driskell, also a witness for plaintiff, corroborated the statement of Mitchell, as to what occurred in front of defendant's house. He does not state the facts with the same minuteness as Mitchell, and differs with him, in this—that he states, the defendant *pushed* the woman and boy into the house, instead of directing them, by a motion of the hand, to go in.

Sarah Gustin says, she lived in the defendant's family, at the time of the occurrence testified to by Mitchell, and heard a part of the conversation between him and defendant. Heard defendant say to Mitchell, he could not arrest the woman and boy, without lawful authority.

The evidence for the defendant, was substantially as follows :

A. H. Barber. Some two or three days after the interview between Col. Mitchell and defendant, referred to by Mitchell, there was a trial at the Court House in Sandusky, on a charge for a riot, made against Mitchell and Driskell, and one Martin; that on this trial, the defendant, at the request of the counsel for the defendants in the riot case, was sworn as a witness; that he related, minutely, what took place in front of his house, between Mitchell and himself; admitting, that in that conversation he had said, he was a law-abiding man, and was only desirous that the colored persons should have a fair trial; but saying nothing of any demand to meet them; or, of any demand of lawful or judicial authority, to make the arrest; or of any refusal by

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defendant to permit the arrest. This statement, so made by the defendant, was assented to by Mitchell, with the exception that defendant had omitted to state the offer to shake hands with the boy, and the interference of defendant to prevent it.

This witness further states, that on the trial of the riot case, Mitchell having observed, that he wished to set himself right before that community, by permission of the Court, made a statement of what took place in front of defendant's house; which agreed, substantially, with that made by defendant on oath. Witness also says, that Mitchell stated, he had nothing to complain of, in reference to defendant's conduct, and that he had treated him like a gentleman. This was stated in a stage coach, as they were on the road from Sandusky to Columbus.

Judge Saddler. Was also present at the trial referred to by Mr. Barber. He corroborates Barber's statement. Says, that the defendant in giving testimony in the riot case, related what took place at defendant's gate, in front of his house; stating that when Mitchell informed him the colored woman and boy were fugitive slaves, and that he had come to take them, the defendant remarked, if he had any legal right to take them, he would not object, but would see that they had a fair trial. Witness understood this, as referring to the trial of the question, whether they were slaves—and supposed the only controversy between Mitchell and defendant was, the place where, and the person before whom, this trial should take place. After defendant had closed his statement, he asked Mitchell if it was correct—and Mitchell replied, it was, except that he had not stated what took place as to his offer to shake hands with the boy.

In the course of the trial, Mitchell also made a statement of what took place at the gate, in which witness did not understand him as having said anything about offering to produce authority to make the arrest, or as having made any

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demand to make the arrest. Mitchell admitted, that defendant had treated him like a gentleman.

Mr. Beecher. This witness stated with great minuteness what took place on the trial of the riot case, agreeing essentially with the statements of Mr. Barber and Judge Saddler.

The depositions of Z. W. Barker, C. S. Mackey, and John N. Sloane, were read by defendant's counsel. Their testimony related to what happened on the trial referred to, and was confirmatory of the statements of the preceding witnesses.

Col. Mitchell. In reply to the inquiry of counsel on that subject, says, he never has made any statement or admission of what took place at defendant's gate, varying in any essential particular from that made by him on this trial, and the preceding trials, between these parties. He now thinks, that the defendant's evidence, in the riot case, was not materially different from that which the witness now gives. Witness understood defendant's testimony on that occasion, as referring to the trial of the two boys, who had been arrested, and that what he said about a fair trial, related to them, and not to the woman and boy. Does not recollect that the matter of the offer to arrest the woman and boy, was in any way in controversy on the trial of the riot case. What he admitted, in regard to the fair conduct of defendant, related to the transaction at the gate, and not to any other matter in which defendant had an agency. Witness also says, that before leaving Sandusky City, he made arrangements with a view to a suit against the defendant for his interference with plaintiff's rights.

Mr. Wheeler. The deposition of this witness was read by the plaintiff. He was one of the counsel employed for the defendants in the riot case, and was present at the trial. His testimony is corroborative of that given by Mitchell.

The counsel for plaintiff here offered evidence, tending to prove the active agency of the defendant in getting up, and

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carrying on the prosecution for the riot, before mentioned : also, a complaint for an assault and battery, in the arrest of the two boys—and an application for their discharge, by writ of habeas corpus, as showing the *quo animo* of defendant, in his interference with the offer to arrest the woman and the boy. This testimony was objected to, on the ground of its irrelevancy to the matters in issue in this suit.

The Court, referring to the fact, that this evidence had been held to be inadmissible, on a former trial between these parties, when Judge McLean was present, now overruled it.

Judge Leavitt stated to the jury the points of law arising in the case, in substance, as follows :

The Constitution of the United States, in the second Section of the fourth Article, declares, that “no person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up, on claim of the party to whom such service or labor may be due.” Under the power conferred by this provision, Congress, on the 12th of February, 1793, passed the act, entitled, “An act respecting fugitives from justice, and persons escaping from the service of their masters.” By the third section of this act, it is provided, that when any person held to labor in one State, shall escape into another, the person entitled to the labor or service of such person, may seize or arrest him or her, and convey him or her before any of the judicial officers designated, within the State in which the arrest was made, for the purpose of making proof that such fugitive owes service to the person setting up such claim, and obtaining a certificate to that effect. The fourth section provides, “that any person who shall knowingly and willingly obstruct, or hinder such claimant, his agent or attorney, in so seizing or arresting such fugitive from labor, or, shall rescue such fugitive from such claimant, &c.; or, shall harbor or conceal such person, after notice

that he or she was a fugitive as aforesaid, shall, for either of the said offences, forfeit and pay the sum of five hundred dollars. Which penalty may be recovered, by and for the benefit of such claimant, by action of debt, in any court proper to try the same; *saving, moreover, to the person claiming such service or labor, his right of action for or on account of the said injury, or either of them.*"

This action is brought under the last clause of the section just quoted. The declaration contains two counts: the first, for obstructing or hindering the arrest of the fugitives; the second, for harboring or concealing them.

To sustain the first count, there must be evidence of some act of interference by the defendant, tending to impair the right of recaption, secured by the Statute. No precise rule can be laid down, by which to determine what act shall constitute an obstruction or hindrance, within the prohibition of the Statute. The right of arrest is conferred by the Constitution and the act of '93, in the most explicit terms, and without any expressed restriction or qualification. It may be inferred, that this power was thus conferred, in part, at least, from the consideration, that the arrest is in the nature of a preliminary proceeding, and not conclusive of the rights of the suspected fugitive. When arrested, such person is to be conveyed, without any unreasonable delay, before some one of the judicial officers named in the Statute, within the State in which the arrest is made, for the purpose of a legal inquiry whether he or she is, in fact, a fugitive from labor. And, it is only by the exhibition of proof establishing the affirmative of this inquiry, that the person arrested can be retained in custody, and removed to the State where "labor and service" are due. On failure to prove this fact, the person arrested is entitled to his discharge; and, it is presumed, would have a right of action against the person making the unlawful arrest, for damages. It may also be suggested,

that there is a further security against a lawless and oppressive arrest, in the fact that by the statutes of many, if not all, the non-slaveholding States, the penalty of the crime of kidnapping is incurred by an unauthorized arrest of any one on pretence that such person is a fugitive from labor, and the attempt to convey him or her to a slaveholding State, to be held in servitude.

It is very clear, that the penalties provided by the Act of Congress, are not incurred by one who is merely passive, in the attempt of the owner, or his agent, to reclaim and arrest an alleged fugitive from labor. The Statute imposes no obligation on any one to aid in the recaption. Under a law so penal in its character, it would be monstrous, by mere implication, to recognize such an obligation. Nor, will the mere inquiry, made in good faith, by what authority an arrest is sought to be made, bring a party within the prohibition of the Statute. The penalty is denounced against any one, who "knowingly and willingly" obstructs or hinders an arrest. In the case of one, who has had no agency in the escape of the suspected fugitive, and is not to be presumed to be apprised of the fact, that the person is a fugitive from labor, and who has taken such person into his employment, or under his protection, without any improper intention, the penalty is not incurred, by merely inquiring into the authority to make the arrest. Such an inquiry, in the case supposed, would be entirely justifiable. Neither is it deemed to be a violation of the rights of the claimant, to insist that the alleged fugitive shall have a fair trial, upon the question, whether he or she owes "labor and service" to such claimant.

On the other hand, it is clear the penalty of the Statute may be incurred, without a resort to violence, in hindering or obstructing an arrest. Any act done, with the intention of defeating the arrest, and which tends to that result, is a violation of the rights of the claimant. If, after knowledge

of the fact that a person is a fugitive, a demand is made to arrest on the premises of another, and refused, such refusal subjects the party to legal liability. An offer having been made to arrest, the party making it is under no obligation to commit either a trespass or a breach of the peace, in carrying his purpose into effect. The withdrawal or removal of the person of the alleged fugitive, by the order or direction of another, so as to prevent an arrest, is also a hindrance and obstruction within the meaning of the Statute.

Having stated these principles, as applicable to the count for obstructing and hindering the arrest, I will briefly notice the count for harboring or concealing.

The learned Judge, who presided in this Court, on the trial of an action between these parties, brought to recover the specific penalty provided for by the Statute, has held that "the words *harbor* or *conceal*, were not used in the Statute as constituting two distinct offences, but as descriptive of one offence." And he has also held, that, "to harbor or conceal a fugitive from labor, within the meaning of the Statute, it must be done with a view to elude the claim of the master." There can be no question, that this is the correct construction of the law. By the express words of the Statute, to constitute the offence of harboring or concealing, there must be notice or knowledge, that the person harbored or concealed, is a fugitive from labor. This presupposes that there must be an intention to prevent a recaption. The intention therefore decides the character of the act. Hence the same eminent Judge, in the case before referred to, says, "if a shelter be afforded to the fugitive, for an hour, a day, or a week, when there is manifestly no design to conceal him from the pursuit of the master or his agent, or in any way to defeat the legal right of the master to his service, there is no violation of the Statute."

Keeping these principles in view, it is for the jury to decide, whether the defendant has harbored or concealed the

fugitive, as alleged in the second count of the declaration. From the evidence, it does not appear, except as a matter of vague inference, that the defendant had knowledge that the woman and boy were slaves, till so informed by Col. Mitchell. And there would seem, therefore, to be no sufficient ground for assuming, that he had been guilty of any violation of the Statute, prior to his obtaining such knowledge from Mitchell. It is insisted, however, that he harbored or concealed the fugitives, after being notified that they were slaves. The only proof in support of this position is, that the defendant said, the woman and boy left his house the evening following the interview between him and Col. Mitchell; having been informed by defendant, that they could remain no longer with him. If, from motives of humanity, the defendant permitted the fugitives to remain with him, for a short time, after notice of their real character, without any design thereby to elude the claim of the owner, he did not "harbor or conceal" them, within the contemplation of the Statute.

It is strenuously contended by the counsel for the defendant, that the testimony of the witness Mitchell is unworthy of credit. Several intelligent witnesses have been called, who state in substance that on the examination which took place at the Court House, in Sandusky, in reference to a charge for a riot, made against Mitchell and Driskell, and one Martin, the defendant was examined as a witness, and made a statement of the facts occurring at his gate, during the interview between him and Mitchell, varying in some essential particulars from the facts as stated by Mitchell, in his testimony in this case. To the correctness of the statement of the defendant, the witness Mitchell gave his assent. It also appears, from the testimony of the witnesses of the defendant, that Mitchell, on the same occasion, gave a narration of the facts occurring during the interview referred to, agreeing essentially with the statement of the defendant,

then made, and in which there was an omission of some important facts, now stated. The credit due to witnesses belongs exclusively to the jury. It will be their duty to reconcile conflicting statements, in such a manner that, if possible, the whole may be regarded as consistent with truth and the integrity of the witnesses. But, if the statements of witnesses are so discrepant that they can not be thus made to harmonize, it will be for the jury to say where the truth lies.

I have now only to suggest, that although this action has originated in the existence of slavery in an adjoining State, the views of the jury, in relation to that subject in the abstract, should exert no influence in their conclusions as to the merits of this controversy. Like every other case tried in a court of justice, it should be decided according to the law and the evidence. If the plaintiff has suffered a wrong, for which the law gives him redress, it is the plain duty of the court and jury to aid him in obtaining that redress. It can not be disguised, that the subject of slavery is at this time a fruitful source of public agitation. Unfortunately, it has become a chief element of political excitement in our country. Whatever may be our individual views of this subject, it is clear, we shall best acquit ourselves of the responsibility now resting upon us, by taking care that the rights of the parties to this action are in no way affected by the existing state of public feeling, on the question of slavery. In Ohio, popular sentiment is no doubt strongly against that institution; and, there are few, if any, of her citizens who do not rejoice, that its admission into the State is precluded by a barrier, that may well be deemed insurmountable. Still, it may be taken for granted, that with very few exceptions, the citizens of that State are disposed readily to accord to the citizens of States in which slavery is tolerated by law, the rights solemnly guarantied to them by the Constitution of the Union, and the laws passed in pursuance thereof. The act of 1793,

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under which the plaintiff has sought redress in this action, has been repeatedly brought to the notice of the Supreme Court of the United States, and that tribunal—on such questions, the only authoritative one in the Union—has adjudged it to be a Constitutional law. It can, therefore, only cease to be a law when repealed by the same authority by which it was enacted.

[The jury returned a verdict for the plaintiff, on the count for hindering and obstructing the arrest—assessing the damages at \$500, the proved value of the slaves in question, at the time of their escape. On the count for concealing and harboring, the verdict was for the defendant.

A motion was filed by the defendant for a new trial, which was overruled, and judgment entered on the verdict.]

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By the patent act of 1836, if a person claim a patent for an invention for which he had obtained a foreign patent, his domestic patent must be limited to fourteen years from the date of publication of his foreign patent.

If, under such circumstances, a domestic patent purports to give the exclusive right of fourteen years from its date, the patent is void.

The officers of the government have no power to grant an exclusive right, except in conformity with the law.

They are the mere instruments of the law.

A plea in bar must show that the plaintiff has no right to recover.

If the facts of the plea may be admitted, and yet the action may be maintained, the plea is bad on demurrer.

Oyer is not demandable of letters patent.

A principle cannot be patented.

An exclusive right to a motive power of electricity or steam, can only be secured by the instrumentality of mechanical inventions or combinations which produce a certain effect.

Messrs. *Andrews & Swan* for plaintiff.

Messrs. *Chase & Gholson* for defendants.

OPINION.

[The following opinion was prepared by Judge McLean, but not delivered, as the parties agreed to certify certain points to the Supreme Court, embracing the principal matters in controversy; but, as the opinion is on several questions arising under the patent law, it is published.]

This action is brought by the plaintiff, who claims the exclusive right to construct a telegraphic line between Wheeling, in the State of Virginia, and the city of Cincinnati, as assignee of Morse's patent, on the plan of his electro magnetic telegraph, against the defendants, who are charged with having infringed said patent, by establishing a similar line on the same route.

The defendants filed eighteen pleas, to several of which the plaintiff has demurred, which brings before the court questions of law that are now to be considered.

The sixth plea alleges, "that before the supposed grant of the said original letters patent, in the first count mentioned, to-wit, on the 18th day of August, 1838, the said Samuel B. Morse took out and received letters patent for the same invention and discovery in the said count mentioned, in a foreign country, to-wit, in the kingdom of France, and from the then king of the French; and said defendants aver that the said letters patent, in said count mentioned, are not limited to the term of fourteen years from the date or publication of said foreign letters patent." To this plea the plaintiff filed a demurrer, which admits that the patent bears date at the time of its emanation, without reference to the foreign patent.

The seventh plea is substantially the same as the sixth, to which there is also a demurrer. By the 8th Sec. Ar. 1, of the Constitution of the United States, power is given to Congress "to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive

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right to their respective writings and discoveries." The act of 10th April, 1790, which was the first law passed by Congress on the subject of patents, authorized a patent to be issued for a useful invention, for any term not exceeding fourteen years. The same limitation is imposed in the acts of 1793 and 1836.

The 8th sec. of the act of 1836 provides, that nothing contained in it "shall be construed to deprive an original and true inventor of the right to a patent for his invention, by reason of his having previously taken out letters patent therefor in a foreign country, and the same having been published at any time within six months next preceding the filing of his specification and drawings." This limits the right of application by a foreign patentee, to six months from the date of his foreign patent. But this limitation was repealed by the 6th section of the act of 1839, which provides, "that no person shall be debarred from receiving a patent for any invention or discovery, as provided in the act of 1836, by reason of the same having been patented in a foreign country more than six months prior to his application : Provided, that the same shall not have been introduced into public and common use in the United States, prior to the application for such patent : and provided also, that in all cases, every such patent shall be limited to the term of fourteen years from the date or publication of such foreign letters patent."

The pleading admits that Morse's patent in this country, was dated at the time it was granted, for the term of fourteen years, although the foreign patent, for the same invention, had been obtained by him some time before ; and this raises the question, whether the patent is valid for fourteen years from its date, or from "the date or publication" of the foreign patent. It is not pretended that the patent is good beyond the latter limitation ; although upon its face it purports to grant an exclusive right for a longer period.

It is insisted that a grant for a larger estate than the grantor possesses, is good for any lesser interest which he may have. This is true ; but is such a case analogous to the one under consideration ? The government has no power to grant, and can convey no right, except in the mode authorized by the law. It is the mere instrument of the law, and can exercise no discretion where the law has defined its power. The constitution authorizes Congress to grant an exclusive right to the inventor for a limited term. And that term is limited in all the acts of Congress, to a time not exceeding fourteen years. Morse's patent purports to give the exclusive right for fourteen years from its date ; but the law limits it to fourteen years from the date of publication of his foreign patent. It is, therefore, a patent issued, not only without the authority of law, but in violation of it.

As the law limits an exclusive right to fourteen years, it is argued that no limitation is necessary on the face of the patent. If this were admitted, it would not aid the patent under which the plaintiff claims. It contains a limitation which extends the exclusive right beyond the act of Congress. And if this may be done in one case, it may be done in all cases.

There are no circumstances which should exempt a foreign patentee from the limitation imposed by law. On the contrary, there are stronger reasons why he should be strictly limited, than any other person. The fact of his having obtained a foreign patent may not be known in this country, unless disclosed by him ; and it is his duty to see that his patent here shall not exceed fourteen years from the date of publication of his foreign patent. Any concealment on his part, in this respect, however innocently done, counteracts the law, and is a fraud upon it.

By an examination of the records of the patent office, any one may correct the date of a domestic patent ; but this cannot be done in regard to a foreign patent, without a trouble and an expense which the law does not impose. If patents

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which give an exclusive right beyond the limitation of law be considered valid for any purpose, the policy of the law is subverted, and numberless frauds may be practiced upon the public. Every act which regulates this right requires the applicant to state his claim in terms so clear and specific as not to mislead the public; and if there be any concealment, from which a fraudulent intent may be inferred, the patent is void. And it is also void, where the specifications do not describe the invention, so as to enable any person of skill to make the thing invented.

The limitation of the exclusive right, is a material part of the patent, and it must be truly stated. And if this is not done, where a foreign patent for the same thing, of prior date, has been taken out, the neglect is not chargeable upon the officers of the government, but upon the patentee, for not representing his right truly. The demurrers to the sixth and seventh pleas must be overruled.

In taking this view of a patent for an invention so creditable to the country, and which, if original, renders so illustrious one of our citizens, we are relieved by the consideration that the error is not fatal to the right of the patentee, but may be corrected by an application to the patent office.

As the publication of this opinion has been delayed some years, and the above point having been ruled by the Supreme Court differently from the above view, I take occasion here to say, that the reasons assigned in that opinion have not shaken my convictions as above stated. I yield to the authority, because it has been so decided by the court, but it fails to convince my judgment.

It is true, the application by Morse for a patent in this country was made before he obtained his French patent, but the application referred to was not in the pleading, and was rather with the view to save his right, than for any other purpose. At that time his discovery was imperfect, and if secured would have been of no advantage to him. Sub-

sequent discoveries were made, and three or four patents were issued, assigning in each re-issue, that by reason of an imperfect description of the invention, the previous patent was void.

The application was made, it is presumed, under the 8th section of the patent law of 1836, which provides that "when-ever the applicant shall request it, the patent shall take date from the time of filing the specification and drawings, not, however, exceeding six months prior to the actual issuing of the patent; and on like request, and the payment of the duty herein required, by any applicant, his specification and drawings shall be filed in the secret archives of the office, until he shall furnish the model and the patent be issued, not exceeding the term of one year, the applicant being entitled to notice of interfering applications." But the corrected patent or specifications last issued, was issued, if I mistake not, more than two years after the application was made.

Under the 13th section of the act, where a patent is void by reason of a defective specification, if the error has arisen by inadvertence or mistake of the patentee, he may have the mistake corrected by a surrender of the patent, and a new patent issues for the residue of the unexpired term. But the re-issued patents in this case do not appear to have been issued for the unexpired term. The term of fourteen years from the date of the patent, was the time specified on its face.

There is believed to be nothing in the patent office which shows that a foreign patent had been obtained by Morse, or that the officers of the patent office had any knowledge of the fact. In the 6th section of the act of 1839, which repeals the act of 1836, which limited to six months from the date of the foreign patent, within which application must be made in this country for a patent for the same thing, but to that section there is a proviso "that in all cases every such patent shall be limited to the term of fourteen years from

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the date or publication of such foreign letters patent." This limitation is as specific as the term of fourteen years in the obtainment of a patent and seven years on the renewal of it. And it seems to me if the time limited to the date of a foreign patent in the case stated, may be disregarded, it may be disregarded in the original grant and also in the renewal of a patent.

If a patent were issued for twenty years instead of fourteen, and if it were renewed for fourteen years, under the general law, instead of seven, I suppose the patent could not be sustained. The same answer could be given to either of the above cases, as in the case of Morse, "the patent is limited by the law." But sound policy requires that the forms of the law should be observed, especially in the performance of a clerical duty, when a deviation from such forms may lead to endless frauds. The reason for accuracy is much stronger where a foreign patent has been obtained, than in the cases stated. For there is no means within the reason of the law, by which the date of the foreign patent can be ascertained, whilst our own patent office is accessible to every person.

In their eighth plea, the defendants say, that the use of the motive power of the electric or galvanic current, "however developed, for making or printing intelligible characters, signs or letters at any distances, is a substantial and material part of the thing patented by the said letters patent in the said count mentioned; and the said defendants aver that the said Samuel F. B. Morse was not the original and first inventor or discoverer of the said part of the thing patented, but that the same was before known to one Dr. Steinheil of Munich, in the kingdom of Bavaria, and used on a line of telegraphs" in that country, &c.

The ninth plea states that the mode and process of propelling and connecting currents of electricity or galvanism

through two or more circuits of metallic conductors, is a substantial and material part of the thing patented, &c.; and the said defendants aver, that the said Samuel F. B. Morse was not the original and first inventor of the thing patented, but that the same was before known to one Edward Davy, of London, in England, &c.

By the 6th section of the patent act of 1836, to entitle the applicant to a patent his invention must be original; "not known or used by others before his discovery; and if, on examination, it shall appear to the commissioner that the applicant was not the original and first inventor or discoverer thereof, or that any part of that which is claimed as new, had before been invented, or discovered, or patented, or described in any printed publication in this or any foreign country," &c., no patent shall be granted.

The 15th section of the same act provides that the defendant in any action, for an infringement of a patent, may plead the general issue, and give notice "that the patentee was not the original and first inventor or discoverer of the thing patented, or of a substantial and material part thereof claimed as new, or that it had been described in some public work anterior to the supposed discovery thereof by the patentee," &c., "provided, however, that whenever it shall satisfactorily appear that the patentee, at the time of making his application for the patent, believed himself to be the first inventor or discoverer of the thing patented, the same shall not be held to be void on account of the invention or discovery, or any part thereof having been before known or used in any foreign country; it not appearing that the same or any substantial part thereof had before been patented or described in any printed publication."

This section is somewhat modified by the 9th section of the patent act of 1837, which provides, that whenever by mistake, accident or inadvertence, and without any willful

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default or intent to defraud or mislead the public, any patentee shall have in his specification claimed to be the original and first inventor or discoverer of any material or substantial part of the thing patented, of which he was not the first inventor, and shall have no legal or just right to claim the same; in every such case the patent shall be deemed good and valid for so much of the invention as shall be truly and bona fide his own; provided, it shall be a material and substantial part of the thing patented, and be definitely distinguishable from the other parts so claimed without right as aforesaid." And a right is given in the same section, to the patentee, to sustain an action at law or in equity, on the patent for an infringement of the part he has invented, notwithstanding he claimed, in his specifications, more than he invented, without costs, unless he shall have entered a disclaimer before the suit was commenced, and then he may recover costs; and provided, that he shall not have "unreasonably neglected or delayed to enter a disclaimer."

These provisions must be construed as though they were embodied in the same act. Prior to the act of 1836, the patent was held to be void where the claim extended beyond the invention. And under that act it was void where a substantial part of the thing invented had "before been patented or described in any printed publication." These are exceptions to the proviso in the 15th section, "that the patent shall not be held void" if the patentee "believes himself to be the first inventor." This act embraces the case where the claimant, acting in good faith, had invented the thing patented, not knowing that the same thing had before been invented, and it had never before been patented nor described in any printed publication. And the 9th section of the act of 1837 somewhat enlarges the rights of the patentee, as it provides that, notwithstanding the 15th section of the act of 1836, the patent shall not be held void where the patentee has acted in good faith, if through "mistake, acci-

dent or inadvertence," he claimed more than he invented, and that the patent, under such circumstances, shall be held valid for so much as he invented; provided he has not unreasonably neglected or delayed entering a disclaimer. An action may be maintained without costs on a patent which is within these provisions, although the claim be wider than the invention.

The eighth and ninth pleas in bar, allege that the patentee was not the inventor of the thing claimed, and two persons are named, one in Bavaria and the other in England, who were the first and original inventors. This, it is insisted, is not a full defense in bar of the plaintiff's right, as the patentee, not knowing of the prior invention, may have invented the thing claimed, and believed himself to be the first and original inventor; and if the prior invention had never been patented nor described in a printed publication, the right of the plaintiff is sustainable under the 15th section of the act of 1836.

A plea in bar must contain a full defense against the right of the plaintiff, and if it fall short of this, it is bad on demurrer. Now, if the truth of these pleas may be admitted, and the action is still maintainable, the pleas are essentially defective. It is said that the defendants could not aver that Morse did not believe himself to be the inventor, as a matter of belief is not susceptible of proof. And that such an averment can only be made by the party who has knowledge of the fact. It is true that the belief of any thing, being an act of the mind, can only be proved by external developments in words or actions. But the pleader is not limited to the matter of belief, or its ordinary developments. He may aver the fact of notice of the prior invention, and prove it on issue joined, by circumstances. No one can shelter himself under a belief, against facts; and any facts or circumstances which show a knowledge of the prior invention, would be fatal to the right asserted. And this may be aver-

red and proved with as much certainty as that an individual had notice of an outstanding equity, when he purchased and acquired title to real property. I think the eighth and ninth pleas are defective in not averring this knowledge, and the demurrers to them are, therefore, sustained.

The eleventh plea of the defendant, which is to the second count in the declaration, alleges "that the said improvement in the said count mentioned, was at the time of the application of the said Morse for a patent therefor, in public use, with the consent and allowance of the said Morse." To which the plaintiff demurs.

The 7th section of the patent act of 1839, provides, that where the right has been sold before the inventor obtains a patent, the purchaser may continue in the exercise of his right, but "that no patent shall be held invalid by reason of such purchase, sale or use, prior to the application for a patent, except on proof of abandonment of such invention to the public; or that such purchase, sale, or prior use, has been for more than two years prior to the application for the patent."

This plea is defective. It does not state that the use was more than two years before the application for the patent, nor that the invention was abandoned by Morse. It may have been in public use through a purchase made of the right within two years preceding the application for the patent, and this, under the above section, does not render the patent invalid.

By the 6th section of the act of 1836, the inventor was entitled to a patent, on application, if the thing invented had not been "known or used by others before his invention thereof, and not, at the time of his application for a patent, in public use or on sale with his consent or allowance, as the inventor." But this provision being incompatible with the 7th section of the act of 1839, is necessarily modified. If the sale and use of the invention before the application for

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the patent, gives the assignee the same right after the emanation of the patent as before, to use the thing invented and to sell it to others, without affecting the validity of the patent, such sale or use, within the limitation of two years before the application, can constitute no objection to the obtainment of the patent. To bar the action, the plea should have averred an abandonment, or that the sale or prior use had been for more than two years before the application. The demurrer to this plea is sustained, and also the demurrer to the twelfth plea, which involves the same principle.

The 13th plea avers a public use of the improvement on several lines specified, "with the consent and allowance of the said Morse, to wit: on the first day of June, 1844." This plea differs only from the two preceding pleas by the averment of the date of the public use under a *videlicet*. The date as stated seems not to be material, and the plea is defective in not averring an abandonment, or a public use, more than two years prior to the application for the patent. We suppose the act refers to the original application for a patent, and not to the surrender of it with the view to correct some error in the specifications. The demurrer, therefore, to this plea must be sustained.

In bar to the second count, the defendants, in their 14th plea, say, "that the combination of a pen lever, pen point or points, and roller, in the specification annexed to the said letters patent, is a substantial and material part of the thing patented by the said letters patent," and they aver that said part was before known, and "was a part of an electro magnetic telegraph, for which the said Morse had taken out and received letters patent in the United States on the 20th June, 1840. To this plea the plaintiff filed a demurrer.

The 12th and 15th sections of the act of 1836, which provide that the commissioner shall not issue a patent where the thing claimed to have been invented has been previous-

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ly, or a substantial part of it, patented ; or where the patent having been issued, shall be void under such circumstances, was designed chiefly, if not exclusively, to apply to a stranger to the application, and not to the applicant personally. But in a certain sense it may apply to him. An individual who has obtained a patent for a thing which he claimed to have invented, cannot at any future time claim another patent for a substantial part of the same thing ; and this is what the plea alleges Morse to have done, which is admitted by the demurrer. In such a case there is no fraud in appropriating the invention of another, but it is an attempt, it would seem, to extend beyond the limitation of the patent law, the exclusive right. This act must be held void as against the policy of the law.

If there be any error or defect in the specifications, it may be corrected by a surrender of the patent without prejudice to the rights of the patentee. If any improvement be made on the original invention, a patent may be obtained for the improvement. But a substantial part of the original invention cannot be patented as an improvement.

The specifications are not made a part of this plea by reference or otherwise, nor are they contained in the declaration, so as to enable the court to say whether the alleged improvement is so described as to distinguish it clearly from the original invention. We can judge only from the face of the pleadings, and from them it appears that a substantial part of the improvement was contained in the original patent.

On the principles laid down in relation to the 8th and 9th pleas, the 14th plea is defective. The truth of the plea may be admitted, and yet the action may be maintained under the 9th section of the act of 1837. The claim for more than was new, may have been made "by mistake, accident or inadvertence, and without any willful default or intent to defraud or mislead the public;" and the claimant may be

"the inventor of a material or substantial part of the thing patented;" and under the circumstances, the patentee, &c., may not have "unreasonably neglected or delayed to enter a disclaimer." A defense is not complete against the right of the plaintiff, under the above section, which does not deny these hypotheses. "In all actions the defendant may plead any matter which shows why the action does not lie, and which being matter of law, is proper to be shown to the court." Bac. Ab. Pleas 9; 3, as in assumpsit, infancy, payment, &c. In these cases, from the nature of the defense, the plaintiff has an implied color of action, bad, indeed, in point of law, if the facts pleaded be true. 1 Chitt. Pl. 444. And this is the character of every plea in bar. It must show, if the facts alleged be true, that the plaintiff has no legal right to recover.

In the 15th plea of the defendants, which is also to the second count in the declaration, they say, "that the mode of combining two or more circuits of electricity or galvanism mentioned and described in the specification annexed to the said letters patent as an improvement, is a substantial and material part of the thing patented, &c. And the said defendants aver that in electro magnetic telegraphs before known, modes of combining, on the same principle as that mentioned and described in the specification annexed to the said letters patent, two or more circuits of electricity or galvanism, existed and formed part thereof, to wit: in one patented to the said Samuel B. Morse, on the 20th June, 1840, by the United States of America, and in one patented to one Edward Davy, of London, in England, on the 4th day of July, 1838, &c. And the said defendants further aver that the said specification annexed to the said letters patent in the said count mentioned, do not specify and point out the improvement in the said mode of combining two or more circuits, &c., so as to distinguish the same from the said modes before known and patented," &c.

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With the exception of the last clause, the remarks made on the fourteenth plea are applicable to this one. And as regards the objection to the last clause, that the new improvement is not distinguished from the former mode, it is sufficient to say that the specifications are not so incorporated into the plea as to constitute a part of it. Oyer of letters patent is not demandable, as of a deed, (1 Arch. 164; 1 Term Rep. 149;) but being a matter of record, it is accessible to the defendants, and should have been stated in the plea, as it is not necessarily a part of the declaration, so as to enable the court to act upon the face of the plea. The demurrer to this plea is sustained.

In the sixteenth plea of the defendants, which is to the first count in the declaration, they say, that "a system of signs, consisting of dots and spaces, and of dots, spaces and horizontal lines," set forth and described in the said letters patent in the said count mentioned, is a substantial and material part of the thing patented by the said letters patent, &c. And the said defendants aver that the said part of the thing patented is not any art, machine, manufacture or composition of matter, or any improvement of any art, machine, manufacture or composition of matter.

The patent not being before us, as it would be, if offered in evidence, or copied into the declaration or plea, we cannot decide this question. Craving oyer does not make the specifications a part of the plea. It would seem that the system of signs named in the plea, constitutes a language, and would come appropriately under the copy-right act. But, if these signs are only named as the effect produced by certain mechanical inventions or combinations, they may not be liable to objection under the patent laws. This can only be decided by an inspection of the patent. The demurrer to this plea, on grounds stated in regard to other pleas, is sustained.

In the seventeenth plea, which also applies to the first

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count in the declaration, the defendants say, "that the use of the motive power of the electro galvanic current, however developed, for making or printing intelligible characters, signs or letters at any distances, is a substantial and material part of the thing patented by said letters patent, and separately and distinctly claimed in the specifications annexed to said letters patent;" and the defendants aver that Morse was not the first and original discoverer, &c. And in the eighteenth plea after stating the above, the defendants aver that the thing so "patented and claimed, is not any art, machine, manufacture or composition of matter, or any improvement on any art, machine, manufacture or composition of matter," &c.

These pleas are subject to the objection that the specifications are not brought before us by the declaration or pleas, and we cannot, therefore, determine the points raised by the demurrers. It may not, however, be improper to remark, that a principle is not patentable. And "the motive power of the galvanic current, however developed to produce a given result," can no more be patented than the motive power of steam to propel boats, however applied. The discovery or application of a power in physics can give no monopoly of that power. Electricity and steam were long known as powerful agents in nature, before the application of either as a motive power. And neither can be exclusively appropriated, except through the instrumentality of mechanical inventions or combinations which produce a certain effect.

CIRCUIT COURT OF THE UNITED STATES.

INDIANA—MAY TERM, 1850.

JOHN NORRIS v. LEANDER NEWTON ET AL.

Under the Constitution of the United States, the master of fugitives from labor may arrest them wherever they shall be found, if he can do so without a breach of the peace, and take them back to the state from whence they fled.

A state judge, on proper affidavit being made, may issue a writ of habeas corpus, and inquire into the cause of detention.

The affidavit of a colored person is sufficient for this purpose.

Every person within the jurisdiction of a state owes to it an allegiance. He is amenable to the laws of the state, and the state is bound to protect him in the exercise of his legal rights.

When it appears, by the return to the habeas corpus, that the fugitives are in the legal custody of the master, and the facts of the return are not denied, there is an end to the jurisdiction of the state judge.

His jurisdiction is special and limited.

When it appears the fugitives are held under the authority of the Union, it is paramount to that of the state.

And so when an individual is held under the authority of a state, the federal judiciary have no power to release the person so held.

If the return to the habeas corpus be denied, the master must prove that his custody of the slaves is legal.

If he fail to do this, or make an insufficient return, the state judge may release the fugitives.

But the master may subsequently arrest them, and prove them to be his slaves.

The master, though he may arrest without any exhibition of claim, or judicial sanction, when required, must show a right to the services of the fugitives.

Messrs. *O. H. Smith* and *Liston* for the plaintiff.

Messrs. *Marshall* and *Jarnegin* for defendants.

CHARGE OF THE COURT.

Gentlemen of the Jury : The plaintiff has brought this action to recover damages for harboring and concealing four colored persons who were his slaves in Kentucky, by reason of which they were enabled to escape, and he has lost their services.

It is proved that the plaintiff is a citizen of Boone county, Kentucky, and that he held, as his property, the negroes—Lucy, Lewis, George, and James—named in the declaration. It is also proved by several witnesses, that these negroes absconded from the service of the plaintiff, on Saturday night, the —— day of October, 1847. Otho Dowdon was at the house of the defendant on that night, saw the negroes there, but, on his rising next morning, at about sunrise, he was informed that they had absconded, and that the plaintiff was in pursuit of them. The witness and several other persons aided the plaintiff in his pursuit of the fugitives for more than one month, but were unable to find them. Certain articles of property, which were known to belong to the negroes, were found near Clarksburg, Indiana; but, not being able to trace them farther, the pursuit was relinquished.

About two years after the slaves had absconded, the plaintiff was informed that they resided in Cass county, State of Michigan. He immediately set out, in company with several persons, to recapture them. On the 27th of September last, the company arrived at Casopolis, a village in the above county, about ten or eleven o'clock at night. The house where the negroes were found was entered. A guard was placed at the door to prevent the escape of any one, and the inmates of the house were charged to make no outcry or alarm. The plaintiff, finding his negroes among others in the house, informed them that he had come to take them back to Kentucky. They recognized him, and the younger boys were willing to return. Lewis, the eldest boy, objected, as he had recently been married. The plaintiff informed

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him that his wife might accompany them, saying that she should be well treated. She, however, declined going with her husband. Lucy, the mother of the children, interposed no other objection than that her husband would be left behind. David, her husband, had absconded with the others, but was not found when they were recaptured.

The four slaves were put into a wagon, Lewis having his arms tied to prevent his escape. The plaintiff's party immediately set out on their return to Kentucky, travelling the remaining part of the night. They took a somewhat circuitous route, passing through the village of South Bend early in the morning of the 28th of September. Between one and two miles south of that village, they stopped to take refreshments. While thus engaged, Crocker, the sheriff of the county, and others, rode up to them, and in a few minutes the company increased to one hundred and forty, or upward, some of them being armed, others had bricks, stones, or clubs. Some of the plaintiff's party observed that force was about to be used to take the negroes from them, and they must resist it. The slaves were directed to get into a wagon, and weapons were drawn. Crocker, one of the defendants, informed the plaintiff that the sheriff had a writ of habeas corpus, and that they had no other object than to ascertain whether the negroes belonged to him. The plaintiff replied that they might ask the negroes whether they were not his slaves. Crocker charged them to answer no questions, but said to the plaintiff that resistance would be useless, as there was force enough to take the negroes back to the village; but, if the plaintiff would agree to return, he should have a fair trial, and it would not detain him more than an hour or two. The plaintiff consented, and returned with the negroes to South Bend.

As they approached the court house, a great number of people, black and white, joined them. Time was given to the plaintiff to procure counsel. It appears that the first

writ of habeas corpus had been issued for Lucy and Richard, the names of the other two boys not being known. After the return to the village, the first habeas corpus was abandoned, and a second writ, naming the four fugitives, was issued. This was on the forenoon of Friday. To the second writ the plaintiff returned, that "the within named persons were held in his custody as his slaves—that he was a citizen of Boone county, where slavery was authorized by law, and that he had a just claim to the persons named, as his slaves, by the laws of that State—that sometime in the month of October, 1847, the said slaves had absconded and fled from his service in said state, and took refuge in the State of Michigan, where he found them on the 27th instant, and then and there arrested them as fugitives from labor, and took them into his custody, and that he was then on his journey to Boone county, Kentucky, with them as his own slaves and property, they being fugitives from labor."

The counsel who appeared for the negroes moved the judge, who allowed the writ, and before whom it was made returnable, to discharge the negroes, on the ground of the insufficiency of the return; and the case was argued by the counsel on both sides. The court-house was crowded with spectators, and great numbers remained outside of the house, there not being room for them within it. Several of the persons within the house were armed with clubs. The crowd became much excited as the argument was in progress.

Under the apprehension that the judge would discharge the fugitives, the plaintiff, by the advice of his counsel, applied for, and obtained, a warrant to arrest the slaves as fugitives from labor, under a statute of Indiana. Hearing that such an application was about being made, Crocker, one of the defendants, who acted as counsel for the negroes, warned the State officer not to issue the warrant, as the Supreme Court of Indiana had declared the statute to be unconstitu-

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tional and void, under the decision of the Supreme Court of the United States in the case of *Prigg v. The State of Pennsylvania*. But the warrant was issued, and was held by the plaintiff to arrest the fugitives, should the judge discharge them.

The judge supposed the procedure was under the act respecting fugitives from labor, of 1793 ; and on the ground that the master had no right to arrest the fugitives to take them out of the State where the arrest was made, but for the purpose only of taking them before some judicial officer of the State, or of the United States, discharged the negroes from the custody of the plaintiff. While the judge was pronouncing his opinion, the plaintiff, holding the writ from the State officer in his hands, arrested the fugitives under it. The opinion being pronounced, Crocker exclaimed in a loud voice, three times, the negroes were discharged—that they were free ; and some one said it was the time for action, and called upon those nearest the fugitives to hand them out.

At this time, the plaintiff, touching each of the fugitives, arrested them under the warrant he held, and his party drew their weapons—one or two revolvers and knives—and, standing near the fugitives, warned the crowd not to approach them. The excitement was intense. The plaintiff claimed the protection of the sheriff, and asked him if he would suffer the fugitives, who were his property, to be forcibly taken from him. The sheriff observed that he was doing all he could to pacify the crowd ; and it was finally agreed that the negroes should be put into jail, for safe keeping. The plaintiff accompanied them to the jail door, declaring that he would trust no one with the possession of them. Crocker entered the jail shortly after it was entered by the plaintiff with the fugitives and the sheriff. On his coming out of the jail, Crocker pacified the crowd by informing them that the sheriff had assured him the negroes should not be surrendered from his custody without a fair trial.

This was a short time after dark, on Friday. On the same evening and the next day, warrants were issued against certain persons of the plaintiff's party, charging them with a riot and other breaches of the peace. One of them was fined by the justice. Civil process was issued against the plaintiff, claiming large damages, in the name of one or more of the negroes, on account of their arrest and imprisonment. Bail was required in the civil and criminal proceedings.

On Saturday, the streets of the village of South Bend were crowded with people, the greater part of whom were colored. The latter entered the village in companies, some of them bearing firearms, and almost all of them had clubs. Through the ensuing day the crowd increased. The number of negroes was estimated, by different witnesses, from one hundred and fifty to four hundred. Many of them came from Cass county, in Michigan.

The Circuit Court of the State met at South Bend on Monday, and the complaints for violations of the criminal laws of the State, against the plaintiff and his party, were made before the grand jury. No bills were found, and the persons charged were discharged from their recognizances.

On Monday, another writ of habeas corpus was allowed by the judge, directed to the sheriff, commanding him to bring forthwith the negroes in his custody before him, etc. A notice was given to the plaintiff of the issuing of this writ, and of the place where the hearing would be had; but the plaintiff, under the circumstances, declined any further attempt to take the fugitives, and assigned as a reason that his rights had been violated, and that he should claim compensation from those who had injured him. The slaves were discharged by the judge, and, surrounded by a great number of colored persons, they proceeded from the court-house to a wagon, in which they were conveyed off.

Under the act of 1793, the master, or his agent, had a right to seize his absconding slave wherever he might be

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found—not to take him out of the State, but to bring him before some judicial officer of the State, or of the United States, within the State, to make proof of his right to the services of the fugitive. But, by the decision in the case of *Prigg v. The State of Pennsylvania*, 16 Peters, — the master has a right to seize his slave in any State where he may be found, if he can do so without a breach of the peace, and, without any exhibition of claim, or authority, take him back to the State from whence he absconded. Believing that this remedy was not necessary to the rights of the master, and, if practically enforced, would produce great excitement in the free States, I dissented from the opinion of the court, and stated my objections with whatever force I was able. But I am as fully bound by that decision as if I had assented to it.

Had the State judge power to issue a writ of habeas corpus in this case? This writ is favored by our laws. It is secured to any person in the fundamental laws of the States and of the Union, as necessary to protect him against acts of oppression. To the people of England it is equally endeared. The people of Indiana, and the people of the other States, have declared that this writ shall not be suspended, except in time of war, or rebellion, and under the greatest emergencies.

Every person within the sovereignty of Indiana, without regard to color or condition in life, is bound by its laws and subject to its jurisdiction; and it is immaterial whether his residence be temporary or permanent; he owes for the time being an allegiance to the State. And the principle applies to a mere traveller through the State. He is amenable to the civil and criminal laws of the State; and the State, so long as he shall remain within it, is bound to protect him in his liberty and in the exercise of his legal rights. In a proper case made, the judicial officers of the State cannot withhold from him the benefit of the writ of habeas corpus.

In the present case, affidavits were made that the fugitives in question were free, and that they had been kidnapped by the plaintiff in the State of Michigan, with the view of making them slaves. An affidavit was made to this effect by a white person, a citizen of Michigan, and by one of the colored persons in the custody of the plaintiff.

It is objected that a colored person, not being a competent witness in Indiana, could not make such an affidavit. I think differently. For this purpose, at least, he may be sworn. It has been so held in Virginia, and in some of the other slave States. The affidavits being presented to the State judge, which show an unlawful detention and imprisonment, he is bound under the law of the State to issue the writ, if demanded. He knows nothing of the case, and can be presumed to know nothing of it, except what appears upon the face of the affidavits.

There can be no higher offense against the laws of humanity and justice, or against the dignity of a State and its laws, than to arrest a free man within its protection, with the view of making him a slave. And this may often be done with impunity, if the remedy by the writ of habeas corpus may not be resorted to. There is no other remedy known to the law, which is so speedy and effectual.

I have no hesitancy in saying that the judicial officers of a State, under its own laws, in a case where an unlawful imprisonment or detention is shown by one or more affidavits, may issue a writ of habeas corpus, and inquire into the cause of detention. But this is a special and limited jurisdiction. If the plaintiff, in the recaption of his fugitive slaves, had proceeded under the act of Congress, and made proof of his claim before some judicial officer in Michigan, and procured the certificate which authorized him to take the fugitives to Kentucky, these facts being stated, as the cause of detention, would have terminated this jurisdiction of the judge under the writ. Thus it would appear that the negroes

were held under the federal authority, which, in this respect, is paramount to that of the State. The cause of detention being legal, and admitted or proved, no judge could arrest and reverse the remedial proceedings of the master.

And the return made by the plaintiff, being clearly within the provisions of the Constitution, as decided in the case of *Prigg v. The State of Pennsylvania*, and the facts of that return being admitted by the counsel for the negroes, the judge could exercise no further jurisdiction in the case. His power was at an end. The fugitives were in the legal custody of their master—a custody authorized by the Constitution and sanctioned by the Supreme Court of the Union. If the facts, on the return of the habeas corpus, had been denied, it would have been incumbent on the master to prove them, and that would have terminated the power of the judge. Had the legislature of Indiana provided, by express enactment, that in such a case the judge should discharge the fugitives, the act would have been void. No procedure under it could have been justified or excused. And in the case under consideration, the custody of the master being admitted to be under an authority paramount to that of the State, the discharge of the fugitives by the judge was void, and, consequently, can give no protection to those who acted under it.

No judge of the United States can release any one from a custody under the authority of the State. Some years since, an individual was indicted in the Circuit Court of the United States for the first circuit, if I mistake not, for a capital offense. The defendant was ascertained to be imprisoned for debt under State process; and the lamented Mr. Justice Story very properly held that he had no power to release him from that custody by a habeas corpus. The authority of the plaintiff to arrest and hold in custody his slaves, under the decision in the case of *Prigg*, was as unquestionable as could be that of an officer acting under judicial process. If

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the master, in his return to the habeas corpus, or in his proof, the return being denied, should fail to show his right to the services of the fugitives, the State judge would have the power to discharge them from his custody. Such a discharge would not be conclusive on the rights of the master. He might again arrest the fugitives, and by additional evidence establish his right to their services. This would be consistent with the dignity of a State, and enable it to give protection to all who are within its jurisdiction, and are entitled to its protection, while, at the same time, it could not impair the rights of the master. It imposes on him no hardship. When he undertakes to recapture his slaves, under the highest authority known to the country, he must be prepared to show, if legally required to do so, that he is exercising a rightful remedy. This remedy being by the mere act of the party, and without any exhibition of claim or judicial sanction, must be subject to the police power of the State, at least so far as to protect the innocent from outrage.

The legal custody of the fugitives by the master being admitted, as stated in the return on the habeas corpus, every step taken subsequently was against law and in violation of his rights. I deem it unnecessary to inquire into the procedure subsequently. It was wholly without authority. The forms of law assumed afford no protection to any one. The slaves were taken from the legal custody of their master, and he thereby lost their services.

It is argued, that the plaintiff abandoned his right to the fugitives by failing to appear to the writ on Monday. Of what value could such an appearance have been to him? His right was admitted in the fullest and broadest terms, as set forth in the return to the second writ. And this being held insufficient by the judge, of what avail could his proof have been? A mistake of the law can not, in such a case, prejudice the rights of the plaintiff.

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No judge of the United States can release any one from a custody under the authority of the State. Some years since, an individual was indicted in the Circuit Court of the United States for the first circuit, if I mistake not, for a capital offense. The defendant was ascertained to be imprisoned for debt under State process; and the lamented Mr. Justice Story very properly held that he had no power to release him from that custody by a habeas corpus. The authority of the plaintiff to arrest and hold in custody his slaves, under the decision in the case of *Prigg*, was as unquestionable as could be that of an officer acting under judicial process. If

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Crocker acted as counsel. So far as his acts were limited to the duties of counsel, he is not responsible. But, if he exceeded the proper limits of a counsellor at law, he is responsible for his acts the same as any other individual. Every person of the large crowd in the court-house, or out of it, who aided, by words or actions, the movement which resulted in the escape of the fugitives, is responsible. On such an occasion, liability is not incurred where no other solicitude is shown by words or actions, than to obtain an impartial trial for the fugitives.

But it is earnestly contended that the slaves were entitled to their freedom, from the privilege given to them by the plaintiff to visit Lawrenceburg, in Indiana, on their own business, to sell articles of produce, and at other times were sent there on the business of the plaintiff.

It appears that the plaintiff was an indulgent master—that he gave to David, the husband of Lucy, and father of the boys, a piece of ground to cultivate in vegetables for their own use and profit. David was seen by several witnesses at Lawrenceburg at different times, selling vegetables; but there is no express evidence that the plaintiff sent him, or consented that he should cross the river. At one time he was seen at Lawrenceburg, and the plaintiff was also seen in the village at the same time, so that an inference may be drawn that David was there with the consent of his master. At another time David was seen at Lawrenceburg, and the oldest boy, Lewis. A yellow woman was also seen with them, who, the witness supposes, though he is not certain, may have been Lucy, the wife of David.

Several witnesses state the confessions of the plaintiff, at South Bend, that he had been very indulgent to the fugitives, in permitting them to sell their vegetables on the Indiana side of the river. Some of these confessions are disproved by persons who were present, and who give an entirely different construction to the words of the plaintiff. Instead of

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saying that he had permitted them to attend the market at Lawrenceburg, he said he had permitted them to attend the market at a village on the Kentucky side, and that he did not know that David might not have crossed the river to find a better market. The conflicting statements of witnesses will be examined and weighed carefully by the jury. Before the interests of the master can be affected by the slave being seen in a free State, it must be clearly shown that he was in such State with the consent of his master. But neither the acts nor the value of the services of David are involved in this case. He has not been arrested by the plaintiff.

It is insisted that, if the slaves had been permitted to go to the State of Indiana by the plaintiff, and afterward returned voluntarily to their master, they could not set up the fact as a ground of their release. The courts of the slave States are divided on this question. It is now pending in a case before the Supreme Court, brought from Kentucky. Under such circumstances, if the jury shall find from the evidence that the fugitives named in the declaration, or any part of them, had, with the consent of the plaintiff, been in Indiana, and had returned to the services of their master, they will so find the fact, and the question will be duly considered on a motion after verdict. There is no pretence to say, when the slaves left the service of the plaintiff, they left with his consent. The facts show clearly that they absconded.

The court are asked to instruct you that as the fugitives are still liable to be recaptured by the plaintiff, he cannot recover their value in damages. Whether the plaintiff shall be able to recapture the slaves, if his right to do so be admitted, is subject to many contingencies which cannot well be estimated by a jury. There is certainly no obligation on the plaintiff to use future exertions to reclaim the fugitives; and it would seem to be unjust that those, through whose instrumentality their services have become lost to the plain-

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tiff, if the jury shall so find, should avail themselves of such a defense. In such a case, the act of Congress of 1793 gives an action to the plaintiff for the damages received. The damages, in the present case, are estimated by two witnesses, one of whom states them at \$2,450, and the other at \$2,700, making a difference between the two estimates of \$250. The plaintiff's counsel claim interest on the damages estimated from the time the negroes absconded. The court will give no instructions on the question of interest, but will say to the jury, if they shall find for the plaintiff, they will assess such damages as, on a full consideration of the evidence, they shall believe he has sustained.

I was gratified at the avowal of one of the counsel in the defense, that he disclaimed all influence with the jury, except that which arose from the facts and law of the case. And he particularly repudiated that argument which invoked the conscience of the jury against the established law. This was a manly avowal, and fit to be made in this place and on this occasion.

No earthly power has a right to interpose between a man's conscience and his Maker. He has a right, an inalienable and absolute right, to worship God according to the dictates of his own conscience. For this he alone must answer, and he is entirely free from all human restraint to think and act for himself. But this is not the case when his acts affect the rights of others. Society has a claim upon all its citizens. General rules have been adopted, in the form of laws, for the protection of the rights of persons and things. These laws lie at the foundation of the social compact, and their observance is essential to the maintenance of civilization. In these matters, the law, and not conscience, constitutes the rule of action. You are sworn to decide this case according to the law and testimony. And you become unfaithful to the solemn injunctions you have taken upon yourselves, when you yield to an influence which

you call conscience, that places you above the law and the testimony. Such a rule can apply only to individuals; and, when assumed as a basis of action on the rights of others, it is utterly destructive of all law. What may be deemed a conscientious act by one individual, may be held criminal by another. In the view of one, the act is meritorious; in the view of the other, it should be punished as a crime. And each has the same right, acting under the dictates of his conscience, to carry out his own view. This would overturn the basis of society.

We must stand by the law. We have sworn to maintain it. It is expected that the citizens of the free States should be opposed to slavery. But with the abstract principles of slavery we have nothing to do. As a political question there could be no difference of opinion among us on the subject. But our duty is found in the Constitution of the Union, as construed by the Supreme Court. The fugitives from labor we are bound, by the highest obligations, to deliver up on claim of the master being made; and there is no State power which can release the slave from the legal custody of his master.

The chief glory and excellence of our institutions consist in the supremacy of the laws. We are instructed to reverence and obey them from our earliest years. And it is this, connected with a faithful administration of the laws, which has given security to persons and property, throughout the wide extent of our country. In this consists, in a great degree, the strength of our government. And we should be careful not to weaken its power. There is enough in the general aspect of our affairs, if not to alarm, at least to admonish us that every cord which binds us together should be strengthened.

In regard to the arrest of fugitives from labor, the law does not impose active duties on our citizens generally. They are not prohibited from exercising the ordinary chari-

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ties of life toward the fugitive. To secrete him, or to convey him from the reach of his master, or to rescue him when in legal custody, is forbidden ; and for doing this a liability is incurred. This gives to no one a just ground of complaint. He has only to refrain from an express violation of the law, which operates to the injury of his neighbor. Is this a hardship ? No law-abiding man can so consider it. He cannot claim a right to do that which the law forbids, without striking at the basis of society. If the law be unwise or impolitic, let it be changed in the mode prescribed ; but, so long as it remains the law, every good citizen will conform to it. And every one who arrays himself against it, and endeavors by open or secret means to bring it into contempt, so that it may be violated with impunity, is an enemy to the interests of his country.

Gentlemen, the case is with you. In your deliberations you will carefully weigh the evidence, and, in coming to a determination, you will be guided only by the evidence and the law.

The jury returned a verdict for the plaintiff, for \$2,850 in damages.

A. J. CAMPBELL v. J. McMANUS.

The equity of redemption before the act of 1843, might be sold on execution ; but that act prohibited such sale by the mortgagee, and required the sheriff to return the execution, that there was no other property on which to levy.

Such a return being made in this case, the court set aside the return on motion, as the act of 1843 had never been adopted.

The court adopted the act to govern the practice in future.

Mr. *Newcomb* for plaintiff.

OPINION OF THE COURT.

An execution was issued for \$1,511 15 and costs, on a judgment obtained by the plaintiff against the defendant. The marshal returned that he had levied on certain lands particularly described, which were mortgaged by the defendant to the plaintiff, prior to the date of the note on which the judgment is founded ; and also for the payment of other notes. That the defendant has no other property in the district, on which a levy can be made, and, therefore, he returned the writ according to the State statute of 1843, without offering the premises for sale.

A motion is now made to set aside the return, accept the levy and direct the marshal to go on and sell. In *Watkins v. Gregory*, 6 Black. 113 ; *Murphy v. Elliott*, Ib. 482, and in *Johnson v. Watson*, 7 Black. 174, it was held that an equity of a mortgagor may be sold on execution. But the statute of 1843, Revised Stat., 462, sec. 48, provides that the equity of redemption shall not be sold by virtue of any execution on a judgment at law, recovered by the mortgagee. And in the 50th section it is provided, that if such execution shall not be collected of the other property of the defendant, the sheriff shall return the same unsatisfied, in whole or in part, as the case may require.

The act of 1843 has not been adopted by this court, and as the law stood when the act of 1828 was passed, adopting the process acts of the respective States, the law authorized the sale of an equity of redemption on execution at law. The court set aside the return, and adopted, by a rule, the law of 1843.

Josiah Lawrence v. White and Stevens.

JOSIAH LAWRENCE v. WHITE AND STEVENS.

A contract to deliver pork at Madison, in the State of Indiana, well put up, for the English market, when received at Baltimore was spoiled; the court permitted evidence to show the condition of the article at New Orleans and at Baltimore, from which the jury might judge, whether it could have been well put up at Madison.

But the jury were instructed that if the pork was put up according to contract at Madison, the defendants were not responsible.

Mr. Sullivan appeared for plaintiff.

Mr. Marshal for defendants.

OPINION OF THE COURT.

This action is brought on a contract to deliver three hundred and thirty-nine boxes of long middles, intended for the English market. There are two kinds of middles. One is called the Cumberland cut, in which a part of the bone is left in. This was the kind contracted for. From six to seven or eight long middles were contained in a box. They were to be shipped to Baltimore by the way of New Orleans. The contract was at first made for five hundred long middles, which was afterwards changed to the above number. *Mr. Payne*, the agent of the plaintiff, superintended the packing. The defendants agreed to put up the pork in prime order. The pork was inspected by experienced inspectors before it was put in the boxes. It was shipped by the way of New Orleans, and when received at Baltimore, it was in a very bad condition. The witnesses say it was worth but little, and was sold to soap boilers. And this action is brought to recover damages, on the ground that the pork was not delivered in prime order, as the contract stipulated.

The court permitted evidence to show the condition of the pork when at New Orleans, and also at Baltimore, from which the jury might infer, whether it could have been put up at Madison in good order.

The court instructed the jury that as the article was inspected and delivered to the agent of the plaintiff, at Madison, and as there was no warranty of the article, or that it should pass inspection at Baltimore, there can be no recovery of damages unless there was a failure to put up the pork in good order by the defendants. An action of deceit is the proper remedy where there has been fraud. If representations were made of the quality of the pork, at the time of the delivery which were untrue, or if there was any deception in the packing of it, and the condition of the pork at Baltimore resulted from the manner in which it was packed at Madison, the defendants may be held responsible. And in that event, the difference between the article contracted for and that which was delivered, will constitute the damages to which the plaintiff is entitled.

On the other hand, if the injury resulted from the shipment of the pork to Baltimore, by the way of New Orleans, by exposure or otherwise, the defendants are not responsible. They did not guaranty the shipment of the pork to Baltimore. Their contract began and ended at Madison, and if the pork was put up by the defendants in good order, at Madison, they are not responsible for any loss or subsequent injury it received on the voyage, or after its delivery at Baltimore.

The jury found for the defendants.

BELL'S ASSIGNEE v. NIMMO ET AL.

Mr. *Cooper* for plaintiff.

Mr. *Breckenridge* for defendant.

OPINION OF THE COURT.

This is an action of debt for eight hundred and forty-three dollars. The defendants pleaded that the obligee represent-

ed to them, that he had a requisition on them from the Governor of Ohio to the Governor of Indiana, to surrender them to answer a charge of larceny in Ohio, which was false, but in consequence of which representation, the bond was given on which this action was brought, to settle the same and for no other consideration. That it was fraudulently obtained, &c. To which plea there was a demurrer.

In Indiana, bonds are made assignable by statute, but the obligor may set up any defense which he had against the obligee. The demurrer admits the fraud alleged in the plea. It is sustained.

CIRCUIT COURT OF THE UNITED STATES.

MICHIGAN—JUNE TERM, 1850.

NEW YORK DRY DOCK v. HICKS.

When an instrument is required by law to be recorded, a certified copy, the person being authorised so to certify, is evidence. The keeper of the records is the proper person to certify.

When a law declares that deeds for the conveyance of lands in the State shall be valid, when executed in any other State, conformably to the laws of such State, when recorded, copies, when duly certified, are evidence.

A deed at common law did not require witnesses.

An act required deeds to be recorded by the Register of Probate, but by law the records were transferred to the Register of Deeds; he may certify, as the records are legally in his custody.

In an ejectment the plaintiff has a right to show a legal title, however, acquired fairly.

A corporation may sue in a State, other than that which granted the charter, by comity.

And on the same principles lands when taken in security for the payment of a debt, or in payment, may be held. There is nothing in the nature of the association which prohibits this.

Messrs. Barstow & Lockwood for plaintiffs.

Mr. Campbell for defendant.

OPINION OF THE COURT.

This is a motion for a new trial, by the defendants' counsel, on the following grounds :

1. Because the transcript of the record of the deed from Isaac Carrier to Lathrop A. G. Grant, was improperly admitted in evidence.

2. Because the transcript of the record of the deed from the said Grant to William Hines, was improperly received in evidence, said deed having been recorded in the office of the Register of Probate, and said transcript being signed by the county Register.

3. Because the deed from Seaman & Norton to plaintiff was improperly admitted in evidence.

4. Because the plaintiff, as a foreign corporation, cannot hold said lands under the laws of Michigan.

The first objection to the deed from Carrier to Grant was, that it was not entitled to be recorded. And if this be sustained, it will follow that the transcript of the record cannot be received as evidence. A certified copy is evidence only where the instrument is required by law to be recorded, or where the law expressly makes the copy evidence.

This deed, it is said, was executed under the act of 1827, Revised laws, page 258. The deed was recorded in 1832. The 1st section of the act provides, "That all deeds or other conveyances of any lands, tenements or hereditaments lying in this territory, signed and sealed by the parties granting the same, having good and lawful right and authority thereunto, and signed by two or more witnesses, and acknowledged by such grantor or grantors, or proved and recorded as is hereinafter provided, shall be good and valid to pass the same lands," &c.

But the deed in question was executed in the State of New York, and under a law which gives effect to it as such, if executed as deeds are required to be executed by the law of New York.

Seeing that deeds executed in the Territory or State of Michigan, are regulated by statute, it cannot be important to inquire what constituted a valid deed at common law. It

is known that at an early day in the history of England, it was not usual for the grantor to affix his signature to the deed, except by his seal, as but few could write. And especially was this the case, in regard to witnesses. Their names, when required, were found endorsed on the back of the deed or were mentioned within it.

The 7th sec. of the same act which requires two or more witnesses to a deed, provides, that deeds for lands in Michigan made without the territory, "shall be acknowledged, and proved, and certified according to and in conformity with the laws and usages of the Territory, State, or Country, in which such deeds or conveyances were acknowledged or proved, or in which they shall be acknowledged or proved, and all such conveyances are hereby declared effectual, and valid in law, to all intents and purposes, as though the same acknowledgments had been taken, or proof of execution made, within the territory, and in pursuance of the laws thereof; and such deeds and conveyances, so acknowledged or proved as aforesaid, may be admitted to be, and shall be recorded in the respective counties."

This places a deed executed out of the State or Territory, according to the laws of the place where it was executed, on the same footing, as if executed within the territory, and conformably to its laws, and such deeds may be recorded.

The objection to the authentication of the copy seems not to be sustainable. The law authorized the deed to be recorded at first by the Register of Probate, but the records kept by him have been transferred by law to the Register of Deeds, and they are now legally in his custody. Under such circumstances the keeper of the records may certify copies, the same as the Register of Probate might have certified, had he retained the custody of the original records. The law which makes copies evidence, when duly certified, is satisfied by the certificate of the person who has the legal custody of the records. No other individual could certify copies. This

right appertains to him from the legal possession of the records. In the case of the *U. States v. Percheman*, 7 Peters' 85, the Supreme Court say: "We think that, on general principles, a copy given by a public officer, whose duty it is to keep the original, ought to be received in evidence."

The third objection is, that the deed from Seaman and Norton was improperly admitted in evidence, because the title set forth in said deed is inconsistent with the title sought to be traced into the said Seaman, and also because it appears by said deed that the title to said premises obtained through the sheriff's sale set forth therein, had been previously conveyed to Henry H. Elliott. And also because the plaintiff had no authority to take or hold the lands in controversy in this suit.

Under the declaration the plaintiffs had a right to show a vested legal title, no matter how, if it was fairly acquired, or through whom it may have been derived. It is sufficient to show that the legal title was in Seaman, and that a quit claim was executed by him. Whether Norton had title or not is of no importance. The recital in the deed shows no title, inconsistent with that which the plaintiff claims through the quit claim of Seaman.

It does not appear from the recitals as alleged, that the title had been conveyed to Elliott. The sheriff did not deed the land to Elliott—at most the recital can show nothing more than an equity.

The objection that the plaintiff under its charter had no power to hold the land in controversy, is founded on the supposition, that a corporation must show the land was taken in its regular course of business, and within its corporate powers.

Under the common law, a corporation, unless prohibited, may purchase and hold real estate. *Angel & Ames on Corp.* 65; 1 *Kyd on Corp.* 69; 2 *Kent Com.* 277, 281. The restriction in England to this is found in the statutes of

mortmain, which have not been enacted in Michigan. The right to take and hold real estate in connection and in furtherance of their corporate powers, is incidental to a corporation. A bank, without any express powers to that effect, may take and hold real estate as a banking-house, and also in furtherance of its business. Ang. & Ames 65 ; 66 and 87 to 92 ; lb. 200 ; 5 Hammond 205 ; 3 Pick. 239.

In the 1st sec. of the act of incorporation, a right to take and hold such real estate as may be necessary in the transaction of its business, is expressly given.

Having this power, the corporation received the land in the exercise of its legitimate functions, as this will be presumed in the absence of proof to the contrary. 3 Wend. 94 ; 16 Mass. 102 ; 7 Serg't & R. 313 ; 7 Cowan 540 ; *Bank v. Paiturre*, 3 Ran. 136.

It is never necessary for a bank to allege, when suing on a note, that it was taken in the ordinary course of business. A corporation is never presumed to have violated its charter. 15 Pick. 310 ; *New Haven Steamboat Co. v. Vanderbilt*, 16 Conn. 420 ; 19 John. Rep. 347 ; 11 John. 517. A note and mortgage appearing on its face to have been executed to the State Bank of Indiana, in its corporate name, will be presumed to be taken in conformity with its charter, *Sparks v. State Bank*, 7 Black. 469. In 4 Peters' 501, it is said that the general issue not only admits the general right to sue, in a corporation, but also to bring the action set forth in the declaration. And that case was brought by a foreign corporation, and the action was in ejectment.

In the discharge of its corporate functions, a bank or any other corporation, is limited to the jurisdiction in which it is created, but it is not controverted, that a bank may sue to recover a debt in any other State. This is placed on the ground of comity, and the right may be exercised wherever it is not prohibited. This doctrine was laid down fully in the *Bank of Augusta v. Earle*, 13 Peters 519. The right of

OPINION OF JUDGE WILKINS.

Motion of Mr. Romeyn, of counsel for defendant Hill, to dissolve injunction heretofore allowed in this case, founded on the bill of complaint, and the allowance of the injunction by the court, without notice, according to the indorsement on the bill, and the records, files and entries in the case, and on the answer filed by the said defendant, George W. Hill.

The bill was filed on the 7th day of July, 1846, and the injunction allowed on the same day. There does not appear to have been any notice given to the defendants, or either of them, according to the provisions of the 5th section of the act of Congress, of the 2nd of March, 1793, which provides that the writ of injunction "shall not be granted in any case, without reasonable previous notice to the adverse party, or his attorney, of the time and place of moving the same." And the 55th rule of practice for the courts of equity of the United States, incorporating this provision of the statute, enjoins due notice on the adverse party, prior to granting any special injunction. There is no proof of notice on the files, and no proof exhibited now that notice was ever given. The injunction, therefore, would now be dissolved, had not all the parties waived the proof of such notice by their voluntary appearance. The provision of the statute being designed for the benefit of defendants, the proof of the notice required by the statute may be waived either before or after injunction issued; and regular reasonable notice will be presumed after an appearance.

This defendant, George D. Hill, by his solicitors, Miles and Wilson, entered his appearance on the 29th of July, 1846; and the other defendants, Henry D. Bennett and George N. Gilbert, likewise voluntarily entered their appearance, by O. Hawkins, their solicitor, on the 14th day of July, 1846. On the 31st of August following, this defendant, Hill, filed

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his first separate answer to the bill of complaint, and on the 20th of October, 1846, his second separate answer. The other defendants never have answered.

These several acts upon the part of the defendant Hill, and the appearance of the other defendants, supply the want of proof of the reasonable notice required by the statute for the protection of the rights of defendants.

But the defendant Hill, in order to sustain this motion, further relies upon the equities exhibited in his answer, which chiefly sets forth an assignment to him, by Henry D. Bennett, on the 19th day of January, 1846, of all the goods, chattels, book accounts, claims and demands, and personal estate of every kind, of the late firm of Bennett & Ford, then (by the previous dissolution of the said firm) the property of the said Bennett, for the purpose expressed in the transfer to him, and including therein a note of the defendant, George W. Gilbert, for \$3125, with interest from the 15th of January, 1846.

This assignment to Hill is on certain conditions, and for certain uses and purposes, and upon certain trusts therein expressed.

The assignor first provides for the payment of certain domestic creditors, in the order in which they are named in the first class, absolutely, and to the whole amount of their respective claims. And after the full payment of these creditors, provision is then made for the pro rata distribution, among the foreign creditors of the firm of B. & F., from the residue of the fund assigned; providing and expressly declaring, that the assignee or trustee "shall first appropriate all the proceeds of the trust to the payment, in the order previously prescribed and set forth, of all the creditors therein provided for, who shall not, at the time of making any payment or dividend, have made, by themselves or attorneys, any costs or expenses upon their claims; and that the claim or claims of any creditor or creditors of the said

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firm, who shall, at the time of making any payment or dividend, have made or occasioned any cost or expense upon their claims, by any resort to any proceeding having a tendency to interfere in any manner with, or prevent or obstruct the easy and economical execution of the trust, shall be postponed, and no payment whatever thereafter be made thereupon, until all the other creditors shall have been paid in full; after which, the remaining proceeds shall be first applied towards the payment, pro rata, of all such claims upon which costs have been made, in proportion to the present amount of said claims, exclusive of costs, so far as the same may be sufficient or necessary to satisfy such claims.

The answers disclose the material facts of the case.

On the first day of January, 1846, the firm of Bennett & Ford, being largely indebted to certain New York merchants, for merchandise purchased during the previous summer and fall, and also indebted to certain persons residing in their vicinage, dissolved their co-partnership; Ford, the retiring partner, on the same day, assigning and selling to Bennett all his interest in the stock of goods, books of account, &c., the property of the said co-partnership, "for the purpose of paying off" the creditors of the said firm, and closing the concern. On the 15th of the same month, the said Bennett sold and delivered to George W. Gilbert the stock of merchandise in the store lately owned by the said co-partners, for the sum of \$3125, and took his note of the same date for that sum, payable in one year. On the 19th of January, but a few days after the dissolution of the partnership, and the sale to Gilbert (all within three weeks), Bennett makes the assignment to the defendant Hill, as set forth in his answer, with the preferences, and limitations, and trusts, therein contained.

No period is fixed in the assignment, when the trust is to be closed. It comprehends the co-partnership estate of the firm of B. & F., viz., "the claims, demands, and personal

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estate of every kind, which recently were the property of said co-partners, and then the property of said Bennett."

The assignor Bennett, divides the creditors of Bennett & Ford into two classes, and designates a preference for the first class in payment.

Annexed to the assignment, and forming a part of the same, is the schedule of property assigned, estimated by the assignor at \$4749 19, inclusive of Gilbert's note for \$3125, given expressly for the stock of goods, which had been, "during the previous summer and fall," purchased on credit by B. & F., from the foreign creditors, composing the second class.

The first class of creditors are those who reside in Ann Arbor and its vicinity, and are directed to be paid first, the full amount of their claims, in the order in which they are named. Their claims are stated at \$849 19; which amount, with the claims of the other creditors, not enumerated by name, but designated generally, as "residing in the neighboring towns," together with the expenses of the trust, will, at a reasonable estimate, bring the first payment to at least \$1200; leaving, for pro rata distribution among the second class of creditors, (chiefly—yea, with one exception—merchants residing in the city of New York, who had, "the previous summer and fall," furnished the firm of B. & F. with their stock of goods, on credit,) the sum of \$3549 19.

The amount stated to be due, in schedule 3, to these foreign creditors, is \$6205 84; to meet which, the above balance of \$3549 19, (if it ever could reach even that amount,) was designed for pro rata distribution; but, with the express provision, by the assignor, Bennett, that if any of this last list of creditors should commence, or have commenced, any legal proceedings for the recovery of their claims, such creditors should be postponed from any payment out of the trust fund, until all the other creditors, domestic and foreign, should have been paid in full; which, from the character of

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the assignment, and the amount appropriated for distribution, would of course be forever; or, in other language, such of the creditors who might bring suit, unless they all did so in second class, are excluded from the fund.

This assignment is, on its face, in law, fraudulent and void, as against the statute of frauds, being made with intent to delay, hinder or defraud creditors of their just and legal actions. Because,—

1st. By the transfer of his interest in the store, by Ford, to Bennett, it is expressly declared for the purpose “of paying off” the creditors of B. & F., without designating any preference between such creditors. By this transfer and assignment, Bennett became the trustee of all the creditors of B. & F., and had no authority to create another trust in the same effects, contrary to the provisions of the first trust, and therein prefer in payment one class of creditors to another class. Bennett was bound, in closing the concern of B. & F., according to the trust conferred upon him by his retiring partner, “to pay off the creditors,” without discrimination or preference; which, if the funds were insufficient to pay all, would of course demand a pro rata distribution amongst all. He had no right to prefer any of the creditors of B. & F., because, however B. & F. might have originally preferred one class of their creditors to another, yet, the terms of the dissolution, as set forth, and the original transfer to Bennett, by Ford, of the effects of B. & F., conferred no such power upon Bennett.

The previous summer and fall, this firm (by the defendant's own showing) obtained credit for merchandise in New York, for better than \$8000. They pass out of their hands, in the short time of a few months, on or before the 15th of January following, better than \$5000 of this property, and then assign the remainder, by the act of Bennett alone, to a trustee of Bennett—not to pay all the creditors a fair proportion of their respective claims, so recently incurred

to the foreign creditors, but absolutely devoting the means of these very foreign creditors—first, to pay other creditors residing on the spot, and then, to distribute among these foreign creditors the remnant, under the threatened penalty of losing all, should they seek a lawful remedy to recover a part of their own. The retiring partner conferred no such authority upon Bennett; and under the sale and transfer to Bennett, for the purposes indicated, he was clearly the trustee of all the creditors of B. & F., without the power of discrimination, and could not subsequently violate the original agreement with Ford.

2d. The creditors of B. & F. had a just right to legal process, at law or in equity, in order to reach either the effects of the co-partnership, or, the individual effects of either of the partners. The provisional stipulation in the assignment of Bennet to Hill, coercing the creditors to “delay their lawful suits” against the firm of B. & F., and so jeopard their claims, is therefore invalid, and a fraud upon the creditors. It “hinders” such lawful process; and, from the character of the assignment, and the powers conferred upon the assignee, as to time, would so tend to delay, as to carry beyond the statute of limitations such claims and demands. Partners contemplating bankruptcy could thus evade the salutary restraint of the statute of frauds, might make individual investments out of the partnership funds and partnership credit, and thus compel creditors to avoid and delay suit, until it would be too late by legal process to search out such hidden investments.

The stipulation in the assignment to Hill, postponing those creditors who bring suit, until all the rest are paid, thus “hinders and delays” them, and is calculated to defraud them “of their lawful suit,” as against the firm of B. & F., to reach the partnership effects, and also the individual effects of each of the partners. To reach either Ford’s estate, or Bennet’s estate, as the debt was joint, the judgment must be against both, and the prohibition to sue is general,

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as to the firm of B. & F. The stipulation is two-fold. 1st. Prohibiting payment to any litigant creditor, until all the others are fully paid; and, 2dly. In paying them, if ever,—confirming such payment to the “present” existing claim, exclusive of costs. By this, the debtor defines who shall be considered as his creditor, and closes all objection on the part of any one, as to the amount of the claim; for, should the matter be contested by any creditor enumerated in the schedules, or not, the sole arbiter is the debtor himself; for, if the disputant resorts to his “lawful suit” to ascertain his right, his whole claim is perilled, and by the amount of the fund appropriated, excluded from payment. This certainly tends “to hinder, and delay, and defraud.”

The statute of this State, following the provisions of 13th Elizabeth c. 5, declares every assignment or conveyance made with intent to hinder, delay or defraud creditors or other persons of their lawful suits, damages, forfeitures, or demands, as against the persons so hindered, delayed, or defrauded, shall be void.

As exhibited in the bill, the complainants recovered judgment in in the Court of U. S. for this District, at the last June Term, against B. & F., for \$1020 77, and \$41 92 costs. They are placed in the 3d list, seventh in order, at \$993 25. Having brought suit, then, the terms and provisions of the trust, postpones the complainants from any participation in the fund assigned, until every other creditor, domestic and foreign, who has not sued, is fully paid. This cannot be sanctioned. Nor can its features be well assimilated to those cases of assignments by debtors in failing circumstances, in which [after surrendering all their property for the benefit of all their creditors, placing them all upon one common footing, without predilection or prejudice to any one creditor] they require the execution of a release by their creditors in their favor, and excluding those who do not execute such release from any participation in the trust

fund. In such cases, the clause stipulating a release, is not a condition imposed upon the estate, but a mere designation of preference of those creditors who are to enjoy it, and for whom the trust is created. A debtor may prefer one class of creditors to another, and such a measure would be neither illegal nor immoral, *per se*: for, as is observed by Chief Justice Marshal in *Brashear v. West and others*, "the right to make such an assignment results from the absolute ownership which every man claims over that which is his own." Whether creditors would come in under such a clause of release depends upon themselves, and not upon the debtor creating the trust. But, in the case under consideration, the trusts of the deed are, that the trustee should convert the assigned effects into money, or, that which would answer the creditors as money,—pay in full the 1st class of creditors designated, and distribute the residue pro rata among the 2d class of creditors, postponing such creditors who should bring their lawful suits, for the recovery of their claims, until all those in the 1st and 2d class, who had refrained from suit, were fully paid the whole amount of their claims. The 2d class, with or without suit, are postponed for an indefinite period, contingent on the full payment of the 1st class; an event altogether uncertain, thereby "sheltering from the claims of creditors" the estate of the debtor, in the language of Mr. Justice Washington, in *Pierpont & Lord v. Graham*, and "in the meantime the estate to be enjoyed by a mere volunteer, not the choice of the creditors." This is providing "for a future preference," contingent upon a future event, not under the control of the debtor or the trustee, namely, the solvency at the end of one year, of one of the principal debtors of the estate, whose indebtedness composes the chief portion of the assets, out of which the creditors of B. & F., are to be paid. By such a provision thus controlling the trust, the debtor, in fact, coerces his creditors to refrain and desist from their legal right to bring suit for

the recovery of their claims against him ; and what other intent could the debtor entertain, in thus contingently postponing one set of creditors to another, (and, in fact, excluding them) than "to hinder and delay them in their lawful suits." He who is but a trustee of their property, virtually declares by such a provision, that they shall not have the remnant of their own, unless they shall refrain and delay from suit. The debtor thus enacts a law for his creditors, and withdraws his effects from their executions and the reach of the common law, in order to compel his creditors, under the apprehension of losing all their claims, to comply with a law of his own enactment. Without such a provision controlling the trust, any creditor suing subsequent to the assignment, would only be entitled to a rateable proportion of his claim existing at the date of the assignment, independent of costs of suit, such costs forming no part of the claims provided for ; and, as to suits instituted prior to the assignment, such a provision would clearly be invalid, as calculated and designed expressly to hinder and delay,—for, if valid, such suits must at once be discontinued, and costs paid, in order to entitle the creditor to distribution. What other design, therefore, could prompt the debtor, in thus clogging the trust, than reserving an ultimate benefit to himself in the prevention of suits by his creditors ? And what other intention can be gathered, than that of "hindering them" in the prosecution of their claims ? No such provision was necessary to protect the fund from being wasted in litigation, and a debtor overwhelmed with debt, and with effects remaining confessedly insufficient to meet more than one third of his engagements, professedly assigning all for the benefit of his creditors, but also expressly excluding all who bring suit or have brought suit, from any benefit in the trust, can have no other object in view, than to defraud some one or more of his creditors, who have either already brought, or, to his knowledge, have contemplated bringing suit.

Such an assignment, by thus confining the distribution of the proceeds of the trust, to such of the creditors as should refrain from their lawful suits, in order to reach either partnership or individual effects, and making the payment of one class depend upon a contingency in future, uncertain as to occurrence and as to time, is a species of unfair coercion, prescribing unreasonable and illegal terms, upon creditors, thereby delaying and hindering them in their lawful suits, and, therefore, fraudulent and void as to such creditors.

In *Brashear v. West and others*, which was a case, where the indenture contained a clause of release as a provision entitling creditors to come in, Mr. Chief Justice Marshall remarks as follows :

“ If this release were voluntary, it would be unexceptionable. But it is induced by the necessity arising from the certainty of being postponed to all those creditors who shall accept the terms by giving the release. It is not therefore voluntary.” “ The objection is certainly powerful, that its tendency is to delay creditors.” “ The weight of this argument is felt.” “ We are far from being satisfied, that, upon general principles, such a deed ought to be sustained.”

If an involuntary release, or, rather a compulsory release be exceptionable, and tends to delay and hinder creditors of their lawful suits, much more exceptionable, certainly, is a provision absolutely prohibiting suit, under the peril of losing the whole claim. If the one tends to delay, surely the other does. In the one case, within a specified period, a release must be executed ; in the other, the last must wait the uncertain contingency of the payment of the first in full, and if suit be brought, and that fact is made apparent to the trustee at the time of a declaration of a dividend out of the remnant of the trust funds, the litigant creditor is further postponed until all the non-litigants are fully paid. If the objection be of “ intrinsic weight” in the one case, it loses no

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force when applied to the other. In the one case, there is a present preference, and, in the other, in the language of Senator Tracy, in *Grove & Wakeman*, "there is a preference on a future contingency." In this case of *Brashear & West*, the venerated and beloved Chief Justice expressly places the decision of the Supreme Court of the United States on the ground, that the court follows the construction of a local law of the State of Pennsylvania, and that the construction which the courts of that State had put on their own statute of frauds, must be received in the courts of the United States. The argument and expressed opinion of the Chief Justice on the point considered, is adverse to the decision pronounced.

The statute of Michigan has as yet received no judicial construction in this State, the case of *Fox and Clarke* not applying to the point raised in this case, so that the question here is entirely new.

In *Halsey and Whitney*, which was also a case where the debtor stipulated for release, the learned Justice Story observes :

"The question never can be whether a remedy exists for the creditors, but, whether the debtor has not endeavored fraudulently to delay or defeat them. Where the debtor stipulates for a release, he surrenders nothing except upon his own terms. He attempts to coerce his creditors, by withholding from them all his property, unless they are willing to take what he pleases to give. This is certainly a delay, and if the assignment be valid, to some extent a defeating of their rights. Has it not a tendency to obstruct the common rights of the creditors ? The question is, whether the intent apparent upon the deed itself, be not to coerce them to a settlement, by embarrassing or delaying their remedy. Such an intent is of itself illegal."

And after reciting and commenting on several decisions in Massachusetts, Pennsylvania, and New York, this profound jurist and honest judge further observes :

"The weight of authority is then in favor of the stipulation of release," and, "I am free to say that, if the question were entirely new, and many estates had not passed upon the faith of such assignment, the strong inclination of my mind would be against the validity of them. As it is, I yield without reluctance, to what seems the tone of authority in favor of them."

In this State, as has been already observed, the question is still open, both as regards an assignment containing a provision postponing the litigant creditor to others, and the validity of such a stipulation of release; the objection alluded to by Justice Story does not exist here, and his reasoning, therefore, in favor of sustaining the clause of release, instead of supporting the peculiar trust in this case, is conclusive against validity. What is the intent apparent upon the deed itself? Is it not to coerce the creditors to a settlement on the debtor's own terms, by embarrassing and delaying their remedy? In the simple interpretation of the language employed in the trust, is it any more or less than this: a surrender of all the property of the co-partnership, for the ostensible benefit of all the creditors, but, at the same time locking it up, from all such as shall bring suit, and without suit making the partial payment of the great body of the creditors dependent upon a distant and an uncertain contingency. Is not this exacting a stipulation in favor of himself and his co-partner, protecting their future acquisitions from future suits, by shielding them until the lapse of time would bar the claims of their creditors? Does not such a provision, if held valid, defeat their rights, unless they are willing to take what the debtor pleases—await the contingency of the trust, and delay and refrain from bringing suit?

In *Austin v. Bell*, the Supreme Court of New York held: "That a deed which does not fairly devote all the property, but reserves a favor to the assigning debtor, unless the cred-

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itors shall assent to his terms, is void, as against the statute of frauds."

It is not, it would seem, the reservation of a portion to himself, that alone constitutes the fraud, although it constitutes a prominent badge of fraud ; but, the prescription of the terms by the creditor, showing the intent to hinder and delay. But in this case, Judge Spencer approbates the decision of Hyslop and Clark, which was an assignment of all the property, without such reservation, but with a stipulation of release ; and in *Searing v. Brinkerhoof*, Chancellor Kent held : " That such an assignment with such a stipulation of release was, on that account, fraudulent and void."

If a stipulation reserving a portion of the estate to himself is a badge of fraud, as connected with the prescription of terms upon the creditors, compelling their assent, certainly a stipulation which protects his future acquisitions from suit, is obnoxious to a like objection. In the one case, he locks up a portion of what he now has. In the other, he locks up all that he may ever acquire, from the just demands of his creditors.

In the case of *Grover v. Wakeman*, Judge Sutherland, in a very elaborate, learned, and conclusive opinion, in which he reviews all the preceding cases in New York, Pennsylvania, and Massachusetts, pronounces the decision of the Court of Errors of New York, that such assignments, containing a provision of release by creditors, in order to entitle them to share in the assigned property, are void. Mr. Justice Sutherland's opinion is rightly considered the opinion of the court, as the resolution declaring the assignment void, incorporating the decision of, and adopted by the court, was proposed by him, after solemn consideration, and his views sustained by Judges Nelson and Savage, who, with him, then composed the Supreme Court of New York, as also by Senator Tracy, in a most lucid exposition of the whole doctrine.

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In the case of *Ingraham v. Wheeler*, the Supreme Court of Connecticut pronounced such a stipulation fraudulent and void, mainly on the principle that it confined the distribution of the property to the releasing creditors. The same principle was also decided in Ohio.

From a review of all these cases, and the careful consideration of the character and object of the assignment of Bennett, of the effects of Bennett & Ford, to the defendant Hill, exhibited in his answer of the 20th October, 1846, I cannot arrive at any other conclusion, but that the assignment was made with the intent to hinder, and delay, and defraud creditors of their lawful suits, and especially Marsh & Compton, the complainants, and is therefore void.

Motion refused.

RATHBONE & CO. v. ORR & HOLLISTER.

An inventor may sell his invention before he obtains a patent.

And after the patent has been obtained, the contract will secure to the assignee the extent of his right.

A declaration which states a right, thus acquired, after the issuing of the patent, against an assignor, is not demurrable.

Mr. *Tabor* and Mr. *Jarnakin* for the plaintiff.

Mr. *Jay* for defendant.

OPINION OF THE COURT.

This action charges the defendants with an infringement of their patent for a stove. In the declaration, it is averred that the inventor did, before issuing of the letters patent, &c., assign his right, title and interest in the said invention, or design, to the said plaintiffs, in the name and style of Rathbone & Co.; as by the assignment, reference being

thereto had in said letters patent, will more fully appear, which assignment is duly executed and recorded in the patent office.

The defendant demurred to the declaration, because the assignment is not alleged to have been made after the application for the patent.

An invention of a machine may as well be sold before as after the application for a patent. The thing invented is the property of the inventor, as much so as the manuscript of an author. Either may be assigned. This is recognised in a late statute, 3 March, 1839, sec. 7. "Where a purchase of the thing invented has been made prior to the application for a patent, he shall be held to possess the right to use, and vend to others to be used, the specific machine," &c. And this, it is declared, shall not be held to invalidate the patent. This gives the right, not only to use the specific machine, but to sell to others, to be used; which gives him an interest, it would seem, equal to that of the patentee.

The law requires the application for the patent to be made by the inventor; and it should be issued in his name. This must, necessarily, be a part of the contract, and no objection is perceived to it. The discoverer sells his right, and obligates himself to obtain the patent. The right is in the inventor as exclusively before the patent as after it; but he must do no act to abandon it to the public. He is not protected against another inventor of a similar instrument or machine, at a subsequent period, nor if any one should pirate the thing. A patent covers these, and enables the patentee to sell his invention publicly, under its protection.

It is a mistake to suppose there can be no right of property, until application is made for a patent. There is no right which will give the inventor an action for an infringement of the invention; but the invention, if valuable, is property which may be sold in the market, the inventor undertaking to procure a patent.

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In many cases, the inventor is too poor to incur the expense of a patent; and to enable him to meet this expense, one half, or one fourth of the right has been sold to an individual who makes the necessary advances. Such a contract is valid. Whether the machine is perfected or not at the time of the sale, if the inventor agrees to make it perfect, and procure a patent, is immaterial.

The demurrer to the second count in the declaration is overruled.

UNITED STATES v. JOHN R. WILLIAMS.

It is not usury, where the writings are not executed at the time of the contract, to charge interest from that date.

An unliquidated demand cannot be offset against the government, or between individuals.

The action of Congress, in the allowance of damages, is conclusive on the judiciary.

It cannot revise the facts on which Congress acted.

The statute of limitations does not run against the government, nor is it chargeable with delays, so as to raise a presumption of payment.

Mr. *Norvell*, District Attorney, for the United States.

Mr. *Backus* for defendant.

OPINION OF THE COURT.

This is a bill in equity, to foreclose a mortgage. On the 27th of June, 1812, the defendant executed four several bonds, each for eight hundred dollars, one bond payable annually, with interest. These bonds were given in payment of a tract of land, 267 23-100 acres, in Spring Wells, secured by a mortgage on the premises.

The defendant, in his answer, admits the purchase and the mortgage, but alleges that the premises purchased, were, in the fall of 1813, occupied and used by the troops of the United States, and that they destroyed the houses, barns,

out-houses, fences and orchards on said premises, and that these constituted the chief value of the premises.

To this answer, the complainants replied, that Congress has investigated the alleged damages done by the troops, on the farm, and that, by an act in 1846, an allowance was made, which was deemed ample for the injury done to the farm, amounting to the sum of two thousand dollars, with interest from the time the injury was done. That this act was passed upon a full investigation of the facts, as proved by the defendant. From the time of the purchase, the defendant has been in possession of the premises, enjoying the rents and profits.

At various times, different acts of Congress were passed, to provide for the payment of damages done to private property by the troops of the United States; and a commissioner was appointed to take evidence, and report to the commissioner of claims, who was authorised to act on such claims. Under these laws, it appears that evidence was taken in the case now before us, with the view of making compensation to the defendant. But it does not appear that there was decisive action taken on the claim of the defendant. And it was not until after the commencement of this suit, when a continuance of the cause was procured, to enable the defendant to apply to Congress for the adjustment of his claim, that the act of 1846 was passed.

The defendant attempts to set up, as an offset, the incomplete procedure of the commissioner, by which the amount of damage done appears to be larger than the allowance afterwards made by Congress.

The action of Congress is conclusive on the subject. No imperfect procedure, by the officers of the government, can modify or affect that allowance. Without such action, the claim was unliquidated, and could not be admitted as an offset in a suit by the government, or between individuals. If the act of 1846 has not done full justice to the defendant,

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his only remedy is by another application to Congress for a higher compensation. The judicial power cannot revise the action of Congress in this respect.

The answer sets up that the bonds given were usurious. It seems, the sale was made before the writings were fully executed, and the interest on the bond was made to run from the time the contract. This is not usury, nor is there any unfairness in the act.

It is also set up, as matter of defence, that from the lapse of thirty years which have transpired since this mortgage was executed, there having been no payment of interest within twenty years, the court will presume the mortgage to have been satisfied. If this rule applied to the government, the facts in the case show that the money has not been paid. This clearly appears from the acts of the defendant, in applying to Congress, and in the preparation made to establish the offset to the mortgage.

But laches are not chargeable to the government. The statute of limitations does not run against it; and on the same principle, the lapse of time affords no presumption of payment against the State.

Judgment may be entered on the mortgage bonds, with interest, deducting therefrom the credit, under the act of 1846, and the payments that have been made.

TIERNAN'S EXECUTORS v. JAMES WOODRUFF.

Amendments are granted to promote justice. In this respect the powers of the court are adequate, and they are liberally exercised.

It is not a sufficient cause to strike out an amendment, because it introduces a new cause of action, embraced by the suit.

Mr. *Hand* for the plaintiffs.

Mr. *Frazer* for defendant.

OPINION OF JUDGE WILKINS.

The action in this case was commenced at June Term, 1847, and the declaration filed on the 2d of August following. The defendant having plead in abatement, his plea was demurred to, and judgment sustaining the demurrer, and ordering defendant to answer over, was entered on the 5th of September, 1848, *being in the June Term of that year.* At the same time, *leave was given to the plaintiff to amend his declaration,* and, by a subsequent record entry of the 22d of January, 1849, it appears that an amended Narr. was filed.

The motion now under consideration is to strike the amended declaration from the files; or that the new count be struck out, because it contains a new substantive cause of action not counted on in the original declaration.

The only declaration now on the files, contains *three* special counts, and the usual money counts in the following order:

First. A special count setting forth a promissory note for \$800, dated 24th June, 1841, and payable in 12 months.

Secondly. Another special count on another promissory note of the same date with the former, for \$2,500, payable in 3 years.

Then follow the counts for money lent and advanced to defendant; for money paid out and expended for the use of the defendant; for money had and received for the use of the defendant; and then, that defendant had accounted, and a balance in arrear was found to be due by him to the testator, which he had promised and neglected to pay. After this, on another sheet of paper, which was appended to that containing the prior counts, is a 3d special count on another promissory note for the sum of \$2,500, of the same date with the two first notes, and of the same character as to parties, but payable in two years after its date.

Rule No. 39 of the rules governing the practice of this court, is not applicable to the determination of the question

now raised, inasmuch as leave was obtained by the special order of the court, and that rule only applies to amendments of course, and at any time, in or out of term, under its specified restrictions.

But the plaintiff's counsel in resisting this motion, contends that the defendant has not laid a proper foundation, forasmuch as it is not made to appear what amendments have been made, and that the court cannot determine from inspection, which of the counts is the amended count.

The declaration on file has two clerical indorsements ; the first is August the 2nd, 1847, stating in general terms that the paper was *then* placed on file, and the other, in the following language : " Amended Narr., filed January 22nd, 1849," which circumstance, connected with the order in which the counts are arranged, clearly shows, and enables the court to determine, that the last special count was the amended count, attached by the counsel to the original declaration.

It is urged by the defendant in support of his motion to strike out this last count, that it is not competent, by way of amendment, to introduce a new substantive cause of action. Before considering this objection, let us look at the facts presented by the record. The plaintiff originally declared in *assumpsit* on *two* promissory notes, drawn by Theodore Romeyn for different amounts, maturing at different periods, and added the usual money counts, answering a *general indebtedment* by the defendant. He plead in abatement, and plaintiff demurring thereto, no further action was had until after judgment on demurrer. On the rendition of that judgment, the plaintiff applied to the court and obtained permission to amend his declaration. This was on the 5th of September, 1848, the June Term being still in session, and only one term having elapsed since the commencement of the suit. The discussion of the demurrer disclosed no error of form, to be rectified by amendment, the plea demurred to, being in substance to the writ; and the plaintiff did not

amend as to matter of form, but superadded the last count, setting forth *another* promissory note, of the same date with the others, being between the same parties, and evidently part of the same original transaction and indebtedment. The last note maturing two years after date, was consequently within the statute of limitations at the time, when leave was obtained to amend, and *when the amended Narr. was filed.*

The summary of these facts, thus presented by the record, is this : An indebtedment on the part of the defendant in June, 1841, to the testator of the plaintiffs, in the amount of these *three notes*, for which they were then given, payable at 1, 2, and 3 years ; the institution of suit in this court on the first and last notes at June Term, 1847 ; the 2d note from some cause not presented by the files, omitted in the declaration of the plaintiff, and, that subsequently, on leave obtained before the lapse of two terms ; the 2d note maturing at two years, is introduced by a new count into the declaration, as part of the plaintiff's original cause of action ; that, at the time the said leave was obtained, a separate suit could have been brought on this 2d note, but that now, if this motion succeeds, the note is outlawed.

Best, Chief Justice, observes, in *Taylor & others v. Lyon*, 5 Bing. 327, that "*Questions for amendment, are questions for the discussion of the court, which, on such occasions is to be exercised as to do justice between the parties.*"

And, Park, Justice, in the same case, says : " Amendments are now generally allowed at every stage of the pleadings for the advancement of justice. The question usually is : "*Will any injustice be done by what is proposed ?*" and, if *not, the amendment is allowed.*"

This is nothing more and nothing less in principle, than what was ruled more than a century before, in *Bearcroft v. The Hundreds of Burnham & Stone*, Leving 347 ; and *The Executors of the Duke of Marlborough v. Glidmore*, 2d Strange 890. Had not the amendments been allowed as proposed in these

cases, the statute of limitations would have operated as a bar, and manifest injustice would have been done the plaintiffs. In the first case, the plaintiff's *servant* had been robbed, and an amendment was permitted, after issue joined, and the trial ready at bar, changing the form of the action and the *character of the fact on which it was based*, as the prior proceeding was for the robbery, and *on the oath of the master*. The case in *Strange* originally averred a promise to the *testator* in his *life time*, which was barred, and the declaration was amended by a new count laying the promise to have been made to the executors since his decease. But the principle governing both cases, is that contained in *Taylor v. Lyon*: Will the proposed amendment work injustice? if not, it should be allowed.

In *Alwin v. Todd*, 27 Eng. Com. Law R. 344, the original action was in covenant on a charter party. The breach assigned was, that the defendant had failed to pay the sum agreed upon, notwithstanding the plaintiff had performed his part of the agreement. The plea was non est factum, denying the covenant. After the lapse of *several years*, (the proceedings at law having been enjoined in chancery by defendant,) the plaintiff was permitted to amend the original declaration by substituting therefor an entirely new count, changing the form of action, declaring for freight, and not upon the covenants of the charter party. The court placing its judgment on the ground of the peculiar circumstances of the case, and allowing the defendant to plead de novo.

These cases show the extent to which the English courts have gone, and the principle by which they have been guided, namely, to prevent injustice being done to either party, by allowing or refusing amendments; that they considered the power discretionary with the court, and to be exercised according to the peculiar circumstances of each case. Tidd, in his elementary treatise, collating the cases, seems to lay down the rule, that a new count should not be added after

the 2d term, because, by the prevailing practice in the English courts of common law, the plaintiff was compelled to declare before the end of the 2d term, or else be non-suited. And this rule of practice was not permitted to apply to that class of amendments which merely varied the manner of stating the cause of action, but was confined to new counts for a different or a new substantive cause of action. 2 Tidd, 754.

The opinion of Lord Kenyon in the case of *Maddoc v. Hammet*, 7 Term. 28, referred to by Mr. Justice Whipple in 1 Doug. 444, does not modify the rule, or question the discretionary power of the court, but places the amendment on the ground that in the *penal action* for usury, a new substantive cause of action would not be permitted to be introduced by way of amendment.

The most reliable American cases seem to me to consider amendments at *any stage* within the discretion of the court, and to be governed by the same principle of doing justice, even to the extent of permitting a new cause of action to be introduced after plea by the addition of a new count to the declaration. The rule is so declared in 1 Dunlap, 294, which cites 2 John. Rep. 206, in which the amendment proposed was refused on the ground of the unreasonable conduct of the plaintiff, in delaying his proceeding; but the court recognise the rule as contained in the English cases. In *Smith v. Barker*, in the C. C. of the U. S., 3 Day 314, the contract declared on was for *building* a ship, yet, the declaration was permitted to be amended while the case was before the jury, so as to exhibit the cause of action to be "the *finishing* of a ship." Livingston, Justice, declaring that the party might *so* amend at any stage of the proceedings.

In the case of the Schooner *Harmony*, 1 Gallison 124, Mr. Justice Story observes: That upon examination *he did not find* that an amendment, introductive of a new cause of action, was objectionable at common law, but that such had

been allowed under particular circumstances; and that the fact that the statute of limitations would run against such new cause of action, was a circumstance presenting a strong reason for permitting such amendment. He refused the amendment proposed in that case, not because the court possessed not the discretionary power, but, because the statute of limitations "had run against the recovery of the forfeiture," and by allowing the amendment it would be introductive of a *new substantive offense*, as the cause of the original information was outlawed.

In some of the States there are statutory provisions conferring the right upon parties to amend their pleadings on or before trial, and the courts have no discretion to refuse. Such is the case in Pennsylvania. The statute of 1806, commonly called the Arbitration law of that State, forbids that the plaintiff shall be non-suited for any informality in any declaration, and confers upon him *the right* to amend at any time before the cause is committed to the jury. *Purd.* 411. In Maryland, amendments may be made before the verdict, so as to bring the matter in controversy between the parties fairly to trial. 4 *Griffith* 951. And in Massachusetts, a similar provision exists, by the statute of 1784. These statutory enactments explain the decisions in those States, which would seem to deny the discretionary power of amendment introductive of a new and kindred cause of action. Mr. Justice Tilhman, in 2 *Serg. & Rawle* 3, places the decision of the court on the construction of the statute, "the object of which was the attainment of substantial justice, unembarrassed by form," and declares that under its provisions, an entirely new cause of action shall not be introduced under pretence of amendment,—that is, in an action of slander, the plaintiff shall not introduce a new count for trover or malicious prosecution; or, in debt or covenant, he shall not amend by changing his action into assumpsit on promises. But, even under the statute, the party might, as a *matter of*

right, provided he adhered to the original cause of action, add a new count, substantially different from the original declaration.

Mr. Justice Duncan, in 8 Serg. & Rawle 287, likewise confines the decision of the court expressly to the construction of the statute, and, as *Ebersol v. King*, and *Cunningham v. Day*, 5 Bin. 51, and 2 Serg. & Rawle 1, had been referred to in the argument, he follows in the path of those cases, and admits the amendment, because it was not the substitution of a new cause of controversy for the original declaration, and was therefore one of the cases provided for in the statute. Such was also the case of *Shook v. McChesney*, 4 Yeates, where, in slander, the court would not permit an amendment adding a new count for a malicious prosecution, such amendments not being within the provisions of the act of 1806.

The application in these cases was not to the *discretion* of the court, under peculiar circumstances, showing that great injustice would be done by a refusal, and asking a boon, under the power conferred upon the court by the common law; but the amendments were demanded as matter of right; and it is error in the inferior courts in Pennsylvania to refuse such statutory amendments, so as to make the declaration conform to the evidence which has been introduced on the trial, and this because the statute conferred the right. Hence the courts in that State have, in the cases cited, based their decisions on the strict construction of the State statute, and employed the language used in this motion, "that a new substantive cause of action cannot be introduced by way of amendment." The question was not, as in 5 Bing.: "Will any injustice be done by what is proposed?" But are we bound by our statute to permit the plaintiff by amendment to institute a new, and an entirely different suit from that set forth in his original declaration?

In the same light do I view the cases of *Hayne v. Morgan*,

Tiernan's Executors v. James Woodruff.

3 Mass. 208 ; *Vandeeff v. Therasson*, 3 Pick. 12 ; *Bull v. Chaylin*, 5 Pick. 304 ; *Heredia v. Ayres*, 12 Pick. 334. But in *Gay v. Homer*, 13 Pick. 535, the court permitted, in an action for slander, new counts showing *other species of slander*, than that contained in the original Narr, on the principle that the injury complained of affected the plaintiff's reputation, and therefore *any new slander* might be added, as it was the same cause of action, namely, an injury to plaintiff's reputation, as that contained in the original counts. Both Chief Justice Parsons and Chief Justice Parker in their opinions in the cases cited, give a construction of the statute of Massachusetts, the latter observing in the case in 5 Pickering, that

"The new count offered under leave to amend, must be *consistent* with the former counts," (that is) of *kindred character* subject to the same plea, and such as might have been originally joined with the others."

And such must be the character of the amendment at common law, although Tindal, Chief Justice, in *Alwin v. Todd*, allowed the entire change of the pleadings, substituting a different cause and a different form of action, and a different defense, from that on which issue had been originally joined.

From a careful, and I may say a laborious consideration of the cases both in England and in this country, and from a solicitude to avoid, if possible, any innovation upon the settled practice of the courts, I have arrived at the conclusion, that it is competent at common law to amend the declaration by a new count, introductive of a new cause of action, provided such amendment corresponds in character with the original count, is a kindred cause, admitting the same pleading and defense, and might have been included within the declaration originally filed, and especially where such cause is outlawed by the statute.

I cannot perceive the injustice to the defendant by an adherence to this principle. The case under consideration

illustrated its propriety. The original cause of action was the indebtment of the defendant to the testator of the plaintiffs in June, 1841. The evidence of that indebtment consisted in three promissory notes, *then* given on time. Action is brought on two of them in this court. In the progress of the cause, and before the end of the 2d term, an amended count, declaring on the promissory note, is by leave of the court, superadded to the original declaration, and this, when a distinct suit might have been instituted upon it, as not then precluded by the statute of limitations. Where then the injustice to the defendant, by not introducing it in this suit? Every legal defense is still open to him. If it be not his contract, or if it has been paid, or, if time was given to the drawer, or, if he was released in any way by the conduct of the holder, all these circumstances of defense are still available—on the new as on the old counts. His plea of the general issue is not affected by the amendment; it may stand, or he may plead the same *de novo*, as applicable now to all the notes. Had distinct and separate suits been brought upon the three notes, the court, on application, would have directed their consolidation into one, to prevent accumulation of costs, and because they were of kindred character, between the same parties, for the same indebtment, and admitted of the same pleading. For the promissory note of itself is not the cause of action; it is but the evidence of a promise, and a promise to pay a previous indebtment the failure to fulfil which gives the right to sue. Where then the injustice in allowing the amendment? Is the defendant taken by surprise? if so, the court will see that *that* circumstance does not impair his defense. Is he deprived of any legitimate defense? No. Does the amendment change the character of the action? No. Wherefore then strike it out? Because, it is argued, it introduces a new substantive cause of action. Suppose it does. It is not adding a count in covenant to a declaration in assump-

sit. It is not building trover upon slander, so abhorrent to the judicial taste of Mr. Justice Tilhman, in *Cunningham v. Day*. It is not, as in *Alwin v. Todd*, changing an action of covenant into a quantum meruit for work and labor done, and extinguishing the entire pleading ab initio; it is not, as in *Strange*, substituting a *different* promise, or, as in *Leving*, altering the very foundation of the action; it is not, as in *1 Douglass*, adding a count for money had and received to a declaration in debt for the recovery of a penalty for money. It is not a count for a fresh indebtedment, accruing since the bringing of the action; but a count on one of the special promises of the defendant to pay the debt existing before the commencement of the suit, the withholding the payment of which debt, is in fact the cause of action, and consequently the new count is in strictness and in truth, not introductory of a new substantive cause of action.

I am not disposed to overturn decisions, although I will not permit even a sacred regard for stare decisis, to lead me to overlook the justice of the case. And when I cannot discover what injustice is done to the defendant, and clearly see that injustice will be done to the plaintiff, by striking out the new count, I cannot, I will not hesitate. "Fiat justitia"—even if the judicial firmament of ages should totter and fall.

If the question was exactly such as that raised before the Supreme Court of the State, I should be inclined to pause, from a just regard to the learning and integrity of that high judicial tribunal. But such is not the case. There, the attempt was "to change an action originally brought to recover a penalty under the statute of usury, into an ordinary common law action for money had and received; there, in the language of Chief Justice Whipple, "the plaintiffs sought to *abandon* their original cause of action, and substitute another, differing from it in *form, substance, and fact*." Here, the amendment has not changed either the form of the action, the substance of the controversy, or the character of the

facts. All these incidents of suit remain as they were, when the declaration was first exhibited and filed. It was in *assumpsit*; it continues in *assumpsit*. Plaintiff declared on promissory notes,—the amount is on a promissory note,—same parties,—and same complaint; the original special counts still remain, and all that is superadded, is another special count of the same character and language as the first, and based upon the same original indebtedment. Under these circumstances, therefore, “to strike the amended count from the files” would be doing great injustice to the plaintiff, and permitting the avoidance of a contract on the sole ground of technical exception.

The motion refused.

CIRCUIT COURT OF THE UNITED STATES.

OHIO—OCTOBER TERM, 1850.

WILLIAM SMALL v. THOMAS W. KING.

This court can exercise no jurisdiction in a case where the maker and indorser of a note, at the time of the assignment, resided in the State where the action is brought.

If the indorser be an accommodation indorser, and the note never went into his possession or ownership, it can make no difference.

Mr. _____ for plaintiff.

Mr. *King* for defendant.

OPINION OF THE COURT.

This action is founded on a promissory note given by Thomas W. King, payable to Rufus King, who assigned it to the plaintiff.

The defendant filed a plea to the jurisdiction of the court, on the ground that the assignor and maker both lived in Ohio, at the time the note was given and indorsed.

The plaintiff replied that Rufus King was an accommodation indorser, and that the note never passed to him. To this plea a demurrer was filed.

The court sustained the demurrer to the replication, and held that there was a want of jurisdiction, under the 11th sec. of the judiciary act of 1789.

HEIRS OF BIGGS v. BLUE ET AL.

When a title is set up under a judgment on an attachment, although the affidavit on which the writ issued does not appear in the record, the judgment cannot be treated as a nullity.

This omission by the clerk does not show that no affidavit was made, as required by the statute.

When the court has a general jurisdiction, irregularities do not make void the proceeding.

The proceedings on the attachment may be erroneous, which may be ground for reversal, but when the judgment is used collaterally, such errors do not make void the judgment.

The attachment was laid on part of a larger tract of land, without describing specially the part.

The judgment on the attachment after the sale of the land, was reversed. The Bank of Steubenville, the plaintiff in the attachment, became the purchaser.

At common law, when a judgment is reversed, the party shall be restored to all he has lost.

And where the thing lost is certain, this is done without a scire facias.

In a suit against administrator of Biggs by the bank, the amount at which the land was purchased was pleaded as an offset, and allowed the administrator.

The land having been sold to an innocent purchaser, the legality of the sale on the attachment becomes a question.

The sale of the tract followed the description of the property given on the service of the attachment, of a part of the tract.

This is indefinite, but may be made sufficiently certain, if the residue of the tract had been sold.

To afford an opportunity to show this fact a new trial is granted.

Messrs. *Stanton, Allison and Curry*, for plaintiff.

Mr. *Stanbery* for defendants.

OPINION OF THE COURT.

This is an action of ejectment for 666 $\frac{1}{2}$ acres of land in Union county. A patent was given in evidence, dated the 15th March, 1822, to Benjamin Biggs, the ancestor of the plaintiffs. The survey was made the 29th October, 1801. The land is situated in the Virginia Military tract.

The heirship of the plaintiffs was proved by several witnesses.

The defendants claim under an attachment sale ; and the principal questions in the case arise, as to the validity of the proceedings on the attachment. It is contended that those proceedings are void on several grounds.

1. There is no affidavit, as the statute requires, in the record.

As this question comes up collaterally, it is not necessary to inquire what effect the objection might have had before a Court of Error, called to revise the judgment on the attachment. But we apprehend that in such a case, the objection would not be available. In making up the record the clerk may have omitted the affidavit, supposing it not to be a part of the record ; and if deemed a necessary part of it, on allegation of diminution a Court of Errors would award a certiorari to perfect the record. When the question comes up collaterally, as in this case, the court cannot presume there was no affidavit, from its not being copied into the record. We know, in fact, that there was an affidavit, as a copy of it certified is before us. But to this it is objected, that it is the copy of a copy.

The court in which the attachment issued had general jurisdiction, and a want of jurisdiction will never be presumed against it. The rule is different as applied to inferior courts of a limited jurisdiction, where, upon the face of the

proceedings, the jurisdiction must appear. In *Voorhees v. The Bank of the United States*, 10 Peters 449, the court say, there is no principle of law better settled, than that every act of a court of competent jurisdiction shall be presumed to have been rightly done till the contrary appears.

In *Grignon's Lessee v. Astor et al.*, 2 Haw. 319, it was held, that "it was for the court to decide upon the existence of the facts, which gave jurisdiction; and that the exercise of jurisdiction warrants the presumption that the facts which were necessary to be proved were proved." "The court say the power to hear and determine a cause is jurisdiction; it is *coram judice* whenever a case is presented which brings this power into action."

The attachment law requires a notice to creditors to be given three months, and it appears from the record that six weeks' notice only was given. On this ground a writ of error having been prosecuted to the Supreme Court of the State, the judgment on the attachment was reversed. There were other irregularities in the proceedings in the attachment assigned, but they were such as were proper to be considered by a Court of Errors, as they did not make the proceedings void.

The Bank of Steubenville brought the attachment to recover a debt against Biggs, the ancestor of the plaintiffs, and the bank became the purchaser of the land which was sold under the attachment. And it becomes an important question to consider what effect the reversal of the judgment can have on the title to the land.

At common law, if a judgment is reversed in error, the party shall be restored to all he has lost. And a writ of restitution will be issued to inquire what profits the plaintiff, who recovered, has taken or received from the land. Com. pl. 306. Where the money appears upon record to have been levied and paid, the defendant shall have restitution without a *scire facias*.

If the plaintiff after a recovery in ejectment is disseized, or makes a feoffment, and then the judgment is reversed, a writ of restitution shall not be awarded against the disseizor or feoffor. 2 Salk. 587. But where money is levied under a judgment and paid to plaintiff, and the judgment is afterwards reversed, the party shall have restitution without a scire facias, as the amount is certain. 2 Salk. 588.

The statute of 1st February, 1822, 2 Chase 1238, 15th sec. provides, "that if any judgment or judgments, in satisfaction of which any lands or tenements belonging to the party hath or shall be sold, shall at any time thereafter be reversed, such reversal shall not affect or defeat the title of the purchaser or purchasers, but in such case restitution shall be made of the moneys by the judgment creditor, for which such lands or tenements were sold, with lawful interest from the day of sale." In this statute there is no exception.

There seems to be no reported case in Ohio involving the precise points now before us. The case of *Hubbell v. Broadwell's heirs*, 5 Ohio 127, has no application where the creditor plaintiff is the purchaser and owner of the land. The court say, "Where lands have passed by a sale under execution to a stranger to the judgment, the statute compels the owner of the land, on reversal of the judgment, to pursue the fruits of the sale, into the hands of his antagonist. But when a party to the judgment purchases and continues to hold, the rule does not apply with the same force."

This seems to be equivalent to saying that the statute does apply, but with less force. The court however add, "The purchaser is a party to the errors, and it seems most consonant with justice to restore the land itself to its original owner, where it remains between the original parties, and within reach of the court, no new rights intervening." Under the circumstances there was a decree for redemption.

It appears that by a decision of the Supreme Court in Jefferson county, in a writ brought by the Bank of Steubenville

against the administrator of Biggs, on a note, the defense set up, under a notice was, that the defendants will claim a set off for twelve hundred dollars, the amount of a sale which is due and owing to defendant as administrator, &c. The cause appears to have been submitted to the court by consent of parties. And the court found that the said Biggs in his life time did assume in manner and form as stated by plaintiff. And they also found "that the defendant was entitled to offset the sum of eleven hundred and forty-two dollars and five cents, that being the amount of the purchase money and interest of the land purchased by the said bank, under the judgment which appears to have been reversed." Thereupon it was considered that the bank recover, &c., deducting the above sum.

The lessors of the plaintiff claim under a patent, on a Virginia Military survey, No. 4075, situate on the waters of Mill creek, containing $666\frac{2}{3}$ acres, more or less. The attachment was laid on No. of survey 4075, containing 375 acres, original quantity $666\frac{2}{3}$ acres. The appraisers under the attachment returned, "also one tract of 375 acres on the No. 4075, original quantity $666\frac{2}{3}$ acres." The deed by the sheriff on the sale under the attachment, states, "also one tract of 375 acres, on the map No. 4075, original quantity $666\frac{2}{3}$ acres.

The appraisement of the 375 acres was at one dollar and twenty-five cents per acre ; it was sold at $83\frac{1}{3}$ cents per acre. The consideration named in the sheriff's deed to the bank was the sum of nine hundred forty-five dollars eighty-three and one-third cents, but this included other tracts than the one now in controversy.

After the reversal of the judgment on the attachment, the consideration money paid by the bank, at the sheriff's sale, was claimed as an offset to a suit brought by the bank against the administrator of Biggs, and was allowed, so that

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no further demand exists by the plaintiffs against the bank. But the legality of that sale remains to be tested. The land attached and sold must be so described as to make it certain; for, if in this respect there was a want of certainty, the legal title of Biggs was not transferred to the bank, and from the bank to the present holders. Every tract attached, or levied on by execution, must contain that certainty of description which would be sufficient in a deed of conveyance. The attachment was laid on a part of a tract, without designating what part. This would seem to be an incurable defect of description, unless certainty can be shown from other facts. As, for instance, if Biggs had sold and conveyed all the tract except the number of acres on which the attachment was laid, that might, perhaps, show with reasonable certainty the particular part attached and sold. On this ground the court granted a new trial in the case, with the view to establish the doubtful points which seemed to have taken the defendants by surprise. They are innocent purchasers, and whilst they rest upon their legal rights, it is but just that they should have a full opportunity of establishing them.

A new trial is granted.

DAVID AUSTEN ET AL. v. HENRY MILLER.

A certificate of deposit, by the cashier of a bank, for a sum named, payable at a future period, with five per cent interest, to the order of the individual for whose benefit the deposit was made, is a promissory note.

A justice of the peace, in Mississippi, ex officio, is a notary public to make demand and protest of a note, and give notice to the indorser.

The next mail after the protest is sufficient notice.

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A decision of a State court on the character of the paper, does not constitute a rule of decision for the federal courts.

It is a question of common or mercantile law, rather than the construction of a statute.

Chase & Bull for plaintiffs.

Fox for defendants.

OPINION OF THE COURT.

On the 1st of February, 1840, the Mississippi Union Bank issued the following certificate :

"I hereby certify, that Hugh Short has deposited in this bank, payable twelve months from 1st of May, 1839, with five per cent. interest till due, fifteen hundred dollars, for the use of Henry Miller, and payable only to his order, upon the return of this certificate. (Signed) WILLIAM P. GRAYSON, Cashier.

On which the following indorsements were made :

Pay to George Lockwood, or order.

HENRY MILLER,
Cincinnati, Ohio.

Pay Austen, Wilmerding & Co., or order, without recourse.

GEORGE LOCKWOOD.

On the 4th of May, 1840, L. V. Dickson, justice of the peace, and ex officio notary public, presented the paper declared on at the counter of the Mississippi Union Bank, at Jackson, and demanded of the teller payment in specie, or its equivalent, which that officer, after consultation with the other officers of the bank, refused ; but offered to pay in the notes of the bank, which the notary would not accept. The defendant Miller was duly notified as indorser, by a written and printed notice, directed to him at Cincinnati, and deposited in time for the first mail of the next day.

In July, 1847, the plaintiffs brought this action against Miller, as indorser. The declaration contained three counts.

1st. Alleging it to be a promissory note of the Union Bank, payable to the order of Henry Miller, and by him in-

dorsed to George Lockwood, who indorsed it to the plaintiffs.

2d. Alleging it to be a draft drawn by Henry Miller, on the Mississippi Union Bank, at Jackson, requesting the bank to pay to George Lockwood, and by him indorsed to the plaintiffs, and charging a due presentment for payment, and notice of non-payment.

3d. On a common count for money lent and advanced, paid, laid out, and expended, money had and received, and on an account stated.

The plea was non-assumpsit.

In the defense it was contended that the instrument declared on was not a promissory note in a mercantile sense, so as to pass by indorsement, under the statute of Ohio. It provides, "that all bonds, promissory notes, bills of exchange, foreign and inland, drawn for any sum or sums of money certain, and made payable to any person or order, or to any person or bearer, or to any person or assigns, shall be negotiable by indorsement thereon; but nothing in this section shall be construed to make negotiable any such bond, note, or bill of exchange, drawn to any person or persons alone, and not drawn payable to order, or bearer, or assigns." A check and certificate of deposit are not mentioned in the statute as being negotiable.

And it is alleged that the Supreme Court of Ohio has decided that this identical paper is not a promissory note, negotiable under the laws of Ohio, as appears from the 4th Vol. page 527 of the Western Law Journal.

Suit was brought by these plaintiffs against Miller, on the same certificate, and was decided at the May Term, 1847, against the plaintiffs. This is claimed as conclusive of the case, as it was made in this State under the statute of the State, which construction is claimed as a rule of decision by the courts of the United States, according to the cases in 6

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Cranch 225 ; 10 Wheaton 50 ; 13 Peters 739 ; 11 Wheaton 367, and 6 Peters 297.

But independently of that decision, it is urged that the instrument is not a promissory note, and that it is not negotiable under the well settled rules of law. To constitute a promissory note, it is said there must be an express promise to pay a certain amount, as an implied promise will not answer. That where there is no more than a simple acknowledgment of the debt, with such a promise to pay as the law will imply, it is not a promissory note. *Patterson v. Poindexter*, 6 Watts & Serg. 231. In that case this question was fully examined, by the Supreme Court of Pennsylvania, on a certificate of deposit, exactly like the one before the court, and which was held not to be a promissory note, after two arguments. That court referred to *Horn v. Redford*, as conclusive on the subject. In *Fisher v. Leslie*, 1 Esp. Rep. 426, it was held that a slip of paper, I O U eight guineas, is not a promissory note, but merely the acknowledgment of a debt.

An instrument acknowledging the receipt of two hundred pounds in drafts for the payment of money, and promising to pay the money specified in the drafts, is not a promissory note. *Williamson v. Bennett*, 2 Comp R. 417.

It was also objected that it was not a promissory note, because it was payable upon a contingency, and not at all events. It was payable only upon the order of Henry Miller, and upon the return of the certificate.

A promissory note, it was said, must not depend upon a contingency. Story on Promissory Notes 22 ; *Williamson et al. v. Bennett et al.* 2 Comp. 417 ; *Roberts v. Peabe*, 1 Barr. 323. This point was decided in the case above cited from 6 Watts & Serg. That case is said to have been well considered, and in which the above points were ruled.

It is asked whether the consideration of a promissory note in the hands of an assignee, can be inquired into. If it can,

it seems to be a negotiable promissory note. And it is claimed that the consideration of the certificate may be inquired into. In a suit against the Mississippi Bank, it might show, it is urged, that instead of money, worthless bank notes were deposited, and that an offer was made to return them.

If this be a promissory note, it is asked, to whom is it payable? The words, for the use of Henry Miller, only indicate the equitable rights of the parties, and do not in any way affect the legal character of the paper, &c.

In reply it was said that in *McCoy v. Gilmore*, 7 Ohio R. pt. 1, 268, it was held that no special form of words is necessary to constitute a promissory note. It is enough if the intent appear, and the sum can be made certain by calculation, &c.

And the court said the certificate had all the essential requisites of a promissory note. The cashier being the active agent of the bank, acknowledged the deposit of fifteen hundred dollars, payable thirteen months from the 1st of May, 1839, with five per cent. interest, for the use of Henry Miller, and payable only to his order, on the return of this certificate. Signed by the cashier. There is no want of certainty on the face of this paper. It was payable on presentation, as notes are often made, which is not a contingency that affects the character of the paper. There is a promise to pay to the order of the person for whose benefit the deposit was made. This is sufficient.

This is not a case in which the rule established by the State court, is followed by the courts of the United States. It is not a question as to the construction of a State statute, but rather a principle of the common or mercantile law which governs the case; and in this view the federal courts rather than the courts of the State, should fix the rule of decision.

Elisha Bloomer v. John H. Stolley.

We can entertain no doubt on the subject. By a proper construction of the certificate, it is in principle a promissory note, and the jury being so instructed, found a verdict for the plaintiff.

Under the statute of Mississippi, a justice of the peace officiates as a notary public, in making a demand, and giving notice.

There was a judgment entered on the verdict.

The case was taken to the Supreme Court by a writ of error, where the judgment was unanimously affirmed.

ELISHA BLOOMER v. JOHN H. STOLLEY.

Congress has the constitutional power to grant the extension of a patent which has been renewed under the act of 1836.

Any legislative act, which does not assume the form of a contract, may be repealed by a subsequent legislature.

It was in the constitutional power of Congress to make special grants to inventors, or to authorise them to be issued in the modes provided.

In granting public lands certain forms and modes of proceeding were required by law.

But this does not prevent Congress from making legislative grants.

The same principle applies in making grants to inventors. They must be limited; but they are issued under established modes, or at the discretion of Congress.

By the construction of the act of 1836, the licensee of a planing machine may run his machine under an extension of the right, by that act.

But that act has no application to an extension of the right by Congress.

There being no provision in the act extending the right, nor in the contract that the assignee should have an interest in the renewal of the patent, none can be implied.

A surrender and correction of a patent, give effect to it in all cases of infringement subsequently accruing, though the patent was originally invalid.

And, for this purpose, the correction of the patent is considered as having been made at the time it was originally issued.

Messrs. Coffin, Norton, and Stanbery for plaintiff.

Mr. Walker for defendant.

OPINION OF THE COURT.

The plaintiff claims, as assignee, the exclusive right of using Woodworth's planing machine, and authorizing others to use it, within the county of Hamilton, in this State, including a certain district opposite thereto, in the State of Kentucky ; and this bill was filed, and an injunction obtained, to enjoin the defendant from running the machine, in violation of the plaintiff's right. The injunction was granted in vacation, and a motion is now made to dissolve it on the following grounds :

1. The extension of the patent granted by Congress was not within its constitutional power, and is, consequently, void.

2. If valid prospectively, the extension cannot affect, injuriously, previously acquired rights.

3. A surrender and renewal of the patent cannot affect previously acquired rights.

Woodworth obtained his patent on the 27th of December, 1828. The patentee died the 9th of February, 1839. On the 16th of November, 1842, the patent was extended seven years, on the application of his administrator, and Congress extended the patent another term of seven years, on the 26th of February, 1845. On the 8th of July, 1845, the original patent was surrendered, and certain defects being corrected, it was re-issued. Bloomer, the plaintiff, claims the title through several assignments ; and, among others, one from Brooks and Morris, who acquired title 29th of August, 1843, and held it until November 4, 1845. On the 11th of September, 1843, they made a license to Stolley. Bloomer's title was acquired July 2, 1849.

The original patent would have expired in 1842, but, being extended under the act of 1836, it was continued to 1849. The validity of this extension has been settled by several of the Circuit Courts ; and, finally, by the Supreme

Court; no objection is made to it. But the extension, by Congress, is alleged to be invalid; and as the right set up by the complainant was derived under this extension, it is alleged to be of no validity.

By the eighth section of the first article of the constitution, power is given to Congress to "promote the progress of science and useful arts, by renewing, for limited times, to authors and inventors, an exclusive right to their respective writings and discoveries." And it is contended that the time of the grant must be limited by Congress in each case as it arises, or by a general provision applicable to all cases, and that the latter would seem to be the most appropriate, if not the only mode of making the grant. Special legislation, it is said, on such a subject, is not only opposed to the spirit of our institutions, but it would be impossible to legislate in each particular case. That the object being to receive an exclusive right, in order to promote the progress of invention, an established mode of procedure is implied. The terms are general to all "authors and inventors," which implies a general regulation on the subject. The time must be limited; and this cannot be done, it is argued, consistently with the constitution and the general policy of our laws, except by a general rule of action. That laws cannot be just which are unequal; and this, it is insisted, was the original understanding of Congress, as appears by the first patent act and acts subsequently passed. The grant was limited to fourteen years, with the power to certain officers, designated in the act of 1836, on the proof of certain facts, to extend the patent for seven years. This power of extension was first given in the act of 1832. It was to be done by Congress on petition and notice. The object of the renewal is to compensate the inventor, on proof that he has not been compensated for his "ingenuity, labor, and expense," in the matter of his invention; and this was made the ground of

extension, whether by Congress or by certain officers of the government.

It is insisted that, by the act of 1836, Congress exhausted its powers, and, consequently, cannot extend the limitation of the grant ; if this could be done, the limitation of the constitution would become a dead letter ; and it is urged that the reasoning in *McCulloch v. Maryland*, 4 Wheat. 316, in this respect, is conclusive against the power of Congress.

When a rule of action is prescribed for the exercise of the executive or judicial power, it must conform to such rule ; and, generally, where no appeal is given, the power, in a particular case, terminates when the act is done ; but this is not the character of a legislative power.

There would seem to be no doubt that the constitutional power in question might have been fully exercised by Congress in making special grants ; this might have engrossed much of the time of Congress, and it might not be thought the most competent body to investigate the facts and do equal justice to inventors ; but this would be a question of expediency, and not of constitutional power. Congress, from the elements of which it is composed, is not considered the most fit tribunal to investigate claims ; and yet it continues to exercise this power.

Unlike the decision of a court, a legislative act does not bind a subsequent legislature. Each body possesses the same power, and has a right to exercise the same discretion. Measures, though often rejected, may receive legislative sanction. There is no mode by which a legislative act can be made irrevocable, except it assume the form and substance of a contract.

If in any line of legislation a permanent character could be given to acts, the most injurious consequences would result to the country. Its policy would become fixed and unchangeable on great national interests, which might retard, if not destroy, the public prosperity. Every legislative body,

unless restricted by the constitution, may modify or abolish the acts of its predecessors ; whether it would be wise to do so, is a matter for legislative discretion.

Congress adopted a system for the sale and granting of the public lands, but no one doubts that it may make special grants of land by law. This has been done ; and the same principle applies to the granting of an exclusive right to an inventor. The machinery through which this right is ordinarily applied for, and obtained, may be dispensed with, and the title may be conferred by a legislative grant ; and this may be done in regard to the extension of an exclusive right by Congress, the same as in originally granting it. No constitutional restriction appears to exist against the exercise of this power by Congress. Whether such a restriction may be found in previously acquired rights, will be considered under another head.

There is no prohibition in the law against a second extension, while provision is made for a first extension, should the inventor bring himself within it. The expressed policy of the law is to compensate the inventor, not only for his expense, but for his labor and ingenuity ; and, if this object be not attained by a first extension, there would seem to be justice in a second. This can only be done by act of Congress, as the law makes no provision on the subject. Had the act of Congress provided for a second extension, on the same principles of the first one, the power could not have been questioned.

It is said monopolies are odious ; but a patent right, that shall compensate the inventor, is not a monopoly, in the general sense of that term. The inventor takes nothing from society. He confers upon it a benefit by his labor and ingenuity ; and it is reasonable that he should be paid for such services, and the law designs to give him nothing more than a compensation ; he is entitled to this by the immutable prin-

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ciples of justice, and it is believed to be given to him by the laws of all civilized nations.

It is alleged that there was no inquiry as to the expenses and labor, when this patent was extended by act of Congress. It is not the province of the judiciary to inquire into the reasons which induced the passage of the law, with the view of testing its validity. If constitutional, it must be enforced, without regard to the policy or justice which dictated it.

The second ground assumes that if Congress had power to extend the right of the patentee, it can only operate prospectively.

Stolley obtained his license the 11th of September, 1843, to run one of the Woodworth machines, until the expiration of the judicial extension under the act of 1836. As the law stood, the exclusive right would then expire and become common; and it is argued that it may be fairly presumed this expectation induced the defendant to incur the expense of purchasing the planing machine, and putting it in operation; but, if this law affect his right, he must take out a new license, or abandon his machine and lose his expenditures; and a reference is made to the case of *Wilson v. Rousseau*, 4 How. 646, where the court held the licensee was entitled to run his machine during the extension of the patent under the act of 1836.

The decision in that case was made by the construction of the act, and can have no application to the legislative extension under consideration. In that act of extension there was no saving of the right of any license, expressed or implied.

In regard to the value of the machine, it may be a matter of doubt whether it was rendered less valuable by the extension of the exclusive right. A right which becomes common can be of no more value to one person than another, except as the capacity and efficiency of one may be supe-

rior to another. If the right to use the machine be common, in all probability it could not be sold for a higher price than it would bring under an extension of the exclusive right. In the latter case, a license must be purchased ; but more than a compensation for this would be realized in lessening the competition ; so that, whether the licensee should elect to run his machine or to sell it, his interests would not be much, if any, affected by an extension of the right. To presume that the patentee would fix the price of a license so high as to discourage a purchaser, is contrary to the ordinary motive of human action.

If an extreme case be supposed of an individual who had expended a large sum in preparing to run several machines, under a license, which, on an extension of the right, the patentee shall refuse to renew, could the law redress such an injury, whether real or supposed ?

It is true, the licensee may have expected that, at the termination of the patent, the right would become common ; but how would his case differ from any other person who had incurred an expenditure equally large to run machines, when the right should become common, but was prevented from doing so by a legislative extension of the patent ? In both cases, the same expectation led to the expenditure, and the same act of extension to the disappointment. In principle, the claims would be the same ; and if the licensee could be held exempt from the operation of the act, the other would be equally exempt. The true answer to the case put is, the expenditure made by the licensee, or any other person, was made with a presumed knowledge of the law that Congress had power to extend the patent ; and, with this knowledge, the risk of a renewal of the patent was incurred. Under such circumstances, there can be no ground for complaint. Congress might have imposed conditions favorable to the licensee, on the renewal of the right ; but this not having been done, and there being no provision in

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the contract of license beyond the time it can be implied.

A retrospective law is not, necessarily. No State can impair the obligations of a contract. The inhibition does not apply to the general rule. *Satterlee v. Matthewson*, 2 Peters 380, this court held that a statute of Pennsylvania was valid, which declared that the relation of landlord and tenant should exist under a certain Connecticut title in that State, although, prior to such statute, the courts had decided that no such relation existed, and effect was given to this statute by the courts of the State, and by the Supreme Court in the case above cited.

The third ground assumes that the surrender and renewal of the patent cannot affect previously acquired rights.

How was the interest of Stolley affected by the legislative extension and subsequent surrender and correction of the patent? In September, 1843, he received a license to run Woodworth's planing machine. This was under the extension of the patent procured by the administrator, which ran to November, 1849. Now, it is admitted that the surrender and renewal of the patent would not affect, injuriously, the right of Stolley. But his right extended only to the limitation of the renewed patent to 1849, and this he has fully enjoyed. That he had no right beyond this has been shown, under the second ground assumed by defendant's counsel. Stolley must be considered as having taken his license, subject to the power of Congress, to extend the patent by a special act, as was subsequently done.

It is said that the surrender of the patent is conclusive evidence of its invalidity, and, consequently, that the patentee could have had no rights under the original patent. This inference is not sustained by the facts. The patent had been sustained on all points of objection, by several of the Circuit Courts, and by the Supreme Court. The thirteenth section of the act of 1836 provides that "the patent so re-

issued, together with the corrected description and specifications, shall have the same effect and operation in law, on the trial of all actions hereafter commenced for causes subsequently accruing, as though the same had been originally filed in such corrected form, before the issuing of the original patent." Now, if the patent were invalid, by reason of a defective specification, as contended, still the right of the plaintiff is sustainable. The ground of complaint is for causes accruing subsequently to the re-issuing of the corrected patent, and in all such cases the corrected patent is made to apply, by the act, as though it had been so issued originally. The argument, therefore, that Stolley acquired rights under the invalid patent, which he could exercise under the legislative extension of the right, is unsustainable. He acquired no right beyond the term for which the patent was renewed, on the application of the administrator.

The extension granted by Congress, it is said, was of the original patent. This is admitted. It was the original patent that was surrendered and corrected after the legislative extension. Under that extension, the patentee could exercise all the rights, and claim all the privileges, conferred by the original patent.

The motion to dissolve the injunction is overruled.

LESSEE OF CALLADAY v. MCKINSEY ET AL.

Swan & Andrews for plaintiff.

Thurman for defendant.

Since the commencement of this suit, the defendant, who claims under a tax title, filed his bill in the State court against the lessor of the plaintiff, a non-resident, and by publication, procured a decree of the title, no notice being

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given to the party nor his counsel in the case, of which the defendant had full notice. With the view of reversing this decree in the State court, the counsel for plaintiff moved a continuance.

On the facts stated, the court continued the cause.

SYLVANUS LATHROP v. WILLIAM STUART.

A judgment or decree of a court having plenary jurisdiction of the subject matter, being averred in pleading, it will be presumed that the requisite prior proceedings were had.

The proceedings under the late bankrupt law of the United States upon the petition of a debtor for relief, are not *ex parte* in their character.

This court will take judicial notice that the District Courts of the Union were invested with exclusive original jurisdiction in such cases; and a decree and certificate of discharge being averred, the court will presume that all previous necessary steps were duly taken.

The 4th section of the late bankrupt act makes the decree and certificate conclusive, unless fraud in obtaining them is averred.

Mr. *D. Peck* for plaintiff.

Mr. *Fox* for defendant.

OPINION OF THE COURT.

The plea to which a demurrer is filed in this case, sets up in bar of the action, the defendant's discharge under the late bankrupt act, by the decree of the District Court of the United States for the Southern District of Alabama. The averment of the plea is, that such decree was duly entered, and a certificate issued in pursuance thereof. It is insisted that the plea is deficient, in not averring that a petition was filed, and that the court had jurisdiction.

It is a principle long since settled, that in pleading the judgment or decree of a court having plenary jurisdiction of the subject, it is not necessary to set forth the proceedings

preliminary to such judgment or decree. The presumption of law is conclusive, that all the requisite prior proceedings were had in the case, till the contrary appears. This general doctrine is not controverted by the counsel in support of this demurrer, but its applicability to a decree of a District Court in bankruptcy is denied. It is contended that proceedings in bankruptcy under the late law were virtually *ex parte*; and that a party pleading a discharge under it, must aver that all the steps required by the statute have been strictly pursued, and that the court had jurisdiction to enter the final decree.

It may be remarked in the first place, that the court can see no reason for holding that bankrupt proceedings are, in any just sense of the term, *ex parte* in their character. By the express requirement of the bankrupt act, the creditors of the petitioner for relief under it were entitled to notice of the pendency of the petition, by publication in at least three newspapers in the District. And, in addition to this, before a final decree of discharge could be entered, every creditor of the applicant whose residence was known, was entitled to notice, either personally served on him, or by letter, directed to him, at his usual place of residence, of the time and place of the hearing of the petition for a final discharge. This court will presume that this requisite of the law has been complied with; and, consequently, that the creditors of the defendant were parties to the proceeding in bankruptcy. In this view, it was not *ex parte*; and the legal presumption in favor of the regularity and validity of the steps pursued prior to the decree, exists in full force.

This court will take judicial notice of the fact, that the District Courts of the Union were vested with exclusive jurisdiction in all original proceedings under the bankrupt act. By the 7th section of that act, it is expressly declared, "that all petitions by any bankrupt for the benefit of said act, and all petitions by a creditor against any bankrupt under said

act, and all proceedings in the case to the close thereof, shall be had in the District Court within and for the District in which the person supposed to be a bankrupt shall reside or have his place of business, at the time when such petition is filed, except where otherwise provided in this act." This provision is quite sufficient, in the judgment of this court, to support the usual legal intendments in favor of the proceedings and jurisdiction of a District Court, in bankrupt cases.

But we suppose the provision of the 4th section of the bankrupt law, declaring the force and effect of a decree of discharge, is conclusive upon the question presented on this demurrer. That provision is as follows: "And such discharge and certificate, when duly granted, shall, in all courts of justice be deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt, which are provable under this act, and shall be and may be pleaded, as a full and complete bar to all suits brought in any court of judicature whatever, and the same shall be conclusive evidence of itself in favor of such bankrupt, unless the same shall be impeached for some fraud or willful concealment by him of his property or rights of property." In the case of *White v. Howe and others*, 3 McLean 294, a construction was given to this provision, in the decision of a demurrer to a plea precisely like that now before this court. This decision was made in the Michigan Circuit Court, Judge McLean presiding. His language is: "The plea is substantially good. It is not necessary to set out in such plea more than the certificate and discharge duly authenticated. The above provision makes these evidence, and conclusive evidence, unless the proceedings shall be shown to have been fraudulent."

The demurrer is therefore overruled.

Samuel R. Henckley v. William H. Hendrickson and Campbell.

SAMUEL R. HENCKLEY v. WILLIAM H. HENDRICKSON & CAMPBELL.

Fraud is not to be presumed, though it may be proved by circumstances.

To disaffirm a contract, the property must be returned, if practicable.

Notes being misdescribed in the declaration, the plaintiff may recover on his general counts.

In such case he can only recover the value of the property, in the market.

When there is no unfairness, the price agreed upon, though extravagant, must be paid.

The value of the thing in the market is the rule, no price being fixed.

Letters of one of the defendants being read on the trial, is no ground for surprise, for which a new trial can be granted.

Mr. Mills for the plaintiff.

Messrs. Stanbery & Campbell for defendants.

OPINION OF THE COURT.

This suit is founded on the sale of a certain stock of hogs represented to have been imported, and which were sold to the defendants at high prices; one rated at one thousand dollars, another at five hundred dollars. Notes were given for the purchase, on a part of which this suit is brought, amounting to twenty-one hundred dollars. The notes were proved on the trial, before the jury. But they having been misdescribed in the declaration, were objected to, when offered in evidence, and the court sustained the objection. The plaintiff then proceeded on his general counts.

The sale was made by Anthony B. Allen, the agent of the plaintiff, to the defendants.

In the defence, fraud was alleged, and that the hogs were of little value; some one or two of them, for which a high price was paid, were of no value. One of the witnesses stated that he could have purchased as good a stock for thirty dollars per head.

Proof was offered of the representations of the value of the hogs by the agent, at the time of the sale, to which an objec-

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tion was made; but the court permitted so far as the representations were made by the agent, at the time of the sale, as a part of the *res gesta*.

Several depositions were taken under a notice in pursuance of the statute of the State, at the taking of which the counsel on both sides were present. The plaintiff's counsel left before the last witness was examined, with the understanding that the witness would only be examined on the same points on which the other witnesses testified. But the examination was on other points. The court held, on objection being made, that the deposition could be read only as taken by consent, to obviate the expense of bringing the witnesses to court; but that the latter part of the deposition objected to, could not be read, except by consent of the parties; consent being given, the whole deposition was read.

Allen's deposition being read, proved his agency, and that he purchased the hogs with the money of the plaintiff, in England. The notes given were transferred to the plaintiff.

The court instructed the jury that fraud could not be presumed, but that it might be proved by circumstances. That to disaffirm the contract, it was necessary for the defendants to return the property to the vendor, or offer to return it. But where this is not done, and fraud exists, the plaintiff can only recover what the property is worth.

The prices appeared to be extravagant, but it was for the jury to say what was the value of the stock, as it was generally estimated in the country. That the true inquiry was, what was the stock really worth in the market. It appears that about this time an extravagant estimate was placed upon this description of stock, and from the letters of one of the defendants read in evidence, his estimate of the value of the property, some time after the purchase, was at least equal to the price he agreed to pay, and that he contemplated a large profit from the contract.

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The estimate is very different now from what it was then. And it will be for the jury to inquire whether the agent of the plaintiff conducted in any degree, by false representations of the value of the stock, to mislead the defendants. Where no fraud or misrepresentation has been used in the sale of an article, the price agreed upon must be paid, if no unfair means were resorted to, to produce such a result.

The jury returned a verdict for the plaintiff.

A motion for a new trial was made on several grounds; among others, that the defendants were surprised at the introduction of the letters of the defendants, speaking of the hogs as of great value, and recommending them to others, &c. But the court overruled the motion, on the ground that there could be no surprise from the letters written by one of the defendants. And that the verdict could not be said to be against the evidence.

Judgment on the verdict.

ZERAH TODD v. STEPHEN CRUMB.

The statute of limitations of Ohio does not bar an action on a judgment.

A judgment is not an agreement, contract, or promise in writing, nor is it in a legal sense a specialty.

Nor is a judgment barred by the provision, that four years shall be a bar to all actions not enumerated in the statute.

It would be inconsistent with the policy of the statute, to bar a judgment in four years, while fifteen years are required to bar a promise in writing.

To an action on a judgment, the defendant cannot, in his plea, contradict the record.

Mr. *Parsons* for plaintiff.

Mr. for defendants.

OPINION OF THE COURT.

This suit is brought on a judgment rendered in the State of New York. The defendant filed four pleas :

1. Nul tiel record.
2. Satisfaction.
3. Statute of limitations of fifteen years.
4. The limitation of four years.

To the 3d and 4th pleas the plaintiff has demurred, and the case on the demurrer is now submitted.

This question arises on a construction of the statute of limitations of this State, and it appears the point has never been ruled by any of the courts of the State.

The statute provides, " that all actions upon the case, covenant, and debt founded upon a specialty, or any agreement, contract, or promise in writing, must be brought within fifteen years." And in the same section it is provided, that "all other actions not herein enumerated, must be brought within four years after such right of action shall have accrued."

As the action before us is founded upon a judgment, it becomes a question whether it is barred by the statute.

It must be observed that the actions by name are not barred, without reference to the causes on which they are founded. An action, whether it be upon the case, covenant, or debt, is barred in fifteen years, if it be founded upon an obligation in writing, and not otherwise. This cannot apply to an action brought on a judgment, as that is not an agreement in writing, nor is it a specialty in the legal sense of that term.

Can the other provision of the act apply : "all other actions not herein enumerated, must be brought within four years after such right of action shall have accrued"? This evidently applies to a contract, written or parol, where the time of action accrues. This cannot be said of a judg-

United States v. Nelson Rector and Smith A. Ellis.

ment strictly, as it has reduced the right of action to judgment. Besides, it would seem to be inconsistent with the policy of the act, to require a suit to be brought in four years from the rendition of a judgment, when fifteen years is the limit to an action on a note of hand or other agreement in writing.

There being no provision of the statute which bars a judgment, it follows there is no limitation to an action brought upon it. The demurrer to the pleas therefore is sustained.

The defendant made affidavit that he had never been served with process, in the suit where judgment was obtained against him ; and that he never employed an attorney to appear for him. From the record in New York it appears the declaration was filed against the defendant in custody, &c. It has been held in New York, that to an action brought on a judgment the defendant may deny in his plea the service of process, even in contradiction of the record. But the correctness of this ruling may well be doubted. If the fact of service of notice appeared from the record, it would seem that the record can no more be contradicted, in this respect, than any other fact apparent on the record.

But as this question is a new one in this court, leave is given the defendant to file his plea, subject to exception ; and the cause was continued.

U. STATES v. NELSON RECTOR AND SMITH A. ELLIS.

The defendants are charged, in this court, of counterfeiting the coin of the United States. They are now in jail, on a criminal charge under the process of the State court ; and a motion is made in behalf of persons who were bail for their appearance at this term, for a habeas corpus to bring the defendants before this court, and from the custody of the State.

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The court said, where a person is in custody under the State authority, this court has no power to take the accused from such custody; nor has a State court power to remove by a habeas corpus a defendant from the custody of a court of the United States.

A habeas corpus should be applied for to the State court with the view of bringing the defendants, by the order of that court, before this court, to answer the charges against them here; after which they can be remanded to the State court.

Or, if the defendants shall be first tried in the State court, this court can direct a *capias* to the marshal to arrest them, so soon as they shall be discharged from their present imprisonment. Under the circumstances, no step will be taken against the bail in this court. After the release of the defendants from State custody, the bail here will be liable for their appearance. Their recognizance will be continued.

JOHN P. CAMPBELL v. SAMUEL KIRKPATRICK.

The 7th sec. of the fugitive act of 1850, creates new offences and penalties.

Jurisdiction is given to the District Court of the United States, both in the criminal and civil prosecutions under the act.

As the Circuit Court has no jurisdiction originally, in a criminal procedure under the statute, it seems not to come within the provisions of the act of 1846, authorising transmissions to be made, of indictments from the District to the Circuit Court.

The act of 1846 does not relate to civil prosecutions.

Mr. *Chambers* for plaintiff.

OPINION OF THE COURT.

A motion was made to dismiss this cause, on the ground that jurisdiction is given to the District Court.

The 7th sec. of the fugitive act of 1850, provides, that if any person shall knowingly and willingly obstruct, hinder, or

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prevent a claimant, his agent or attorney, or any person or persons lawfully assisting him, from arresting such a fugitive from service or labor, either with or without process as aforesaid, or shall rescue, or attempt to rescue such fugitive, or shall aid, abet or assist such person so owing service or labor as aforesaid, directly or indirectly, to escape from such claimant, his agent or attorney, or other person or persons legally authorised as aforesaid, or shall harbor or conceal such fugitive, so as to prevent the discovery and arrest of such person, after notice or knowledge of the fact that such person was a fugitive from service or labor, shall, for either of said offenses, be subject to a fine not exceeding one thousand dollars, and imprisonment not exceeding six months, by indictment and conviction before the District Court of the United States, for the District in which such offense may have been committed, or before the proper court of criminal jurisdiction, if committed within any of the organized territories of the United States; and shall moreover forfeit and pay, by way of civil damages to the party injured by such illegal conduct, the sum of one thousand dollars, for each fugitive so lost as aforesaid, to be recovered by action of debt, in any of the District or Territorial Courts aforesaid, within whose jurisdiction the said offense may have been committed."

The provisions of this statute are explicit, both as regards the prosecution by indictment for the offense stated, and also the prosecution of a civil action for the thousand dollars penalty for each slave that escapes, through the interference of the defendant, as the statutory damages to be recovered. The jurisdiction is given to the District Court and not to the Circuit Court. The motion for a dismissal is, therefore, granted.

At the time the above decision was made, the court was not aware that a different decision had been made in the New England Circuit, and, perhaps also, in the Southern District of New York.

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Those decisions, it is understood, were made chiefly under an act to regulate the proceedings in the Circuit and District Courts of the United States, and for other purposes, passed the 8th of August, 1846. The 2d section of that act provides, that "whenever the District Attorney shall deem it necessary, it shall be lawful for any Circuit Court, in session, by order entered on its minutes, to remit to the next term or session of the District Court of the same District, any indictment pending in the said Circuit Court, when the offense or offenses therein charged may be cognizable by the said District Court; and in like manner it shall be lawful for any District Court to remit to the next term or session of the said Circuit Court of the same District, any indictment pending in the said District Court; and such remission shall carry with it all recognizances, processes, and proceedings in the case in the court from which the remission is made; and the court to which such remission is made, shall, after the order of remission is filed therein, act and proceed in the case, as if the indictment, and all other proceedings in the same, had been originated in said court."

The 3d sec. provides, "that the District Court may remit to the Circuit Court, any indictment pending in said District Court, when, in the opinion of the court, difficult and important questions of law are involved in the case; and the proceedings thereupon shall, thereafter, be the same in the Circuit Court, as if such indictment had been originally found and presented therein."

The above provisions would seem to have no application to a civil case. They apply to indictments, and to cases of which the Circuit and District Courts have concurrent jurisdiction. The third section provides that the case remitted from the District to the Circuit Court shall be prosecuted "as if such indictment had been originally found and presented therein." Now this could not be said of a case in which the Circuit Court had no original jurisdiction.

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By the above statute the criminal jurisdiction of the District Court was enlarged, so as to make it concurrent with the Circuit Court; and the remissions from one Circuit to the other were intended to facilitate the public business. But the statute applies only to criminal cases.

The fugitive law creating the offense stated, was passed four years after the law authorizing remissions of indictments from the one court to the other, and the jurisdiction is given to the District Court. The Circuit Court has no jurisdiction under the act creating the offense, and it does not, therefore, come within the provisions of the act of 1846. That act created no new jurisdiction in either court, but merely provided for an exchange of jurisdictions which was vested in each. It therefore would seem to be clear that an indictment under the fugitive law, of which the District Court has jurisdiction expressly given, and of which the Circuit Court has no jurisdiction under the act, cannot be transmitted to and tried by the Circuit Court. And as the act of 1846 is limited to criminal cases, it can have no application to civil actions, brought for the penalty under the act.

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The 14th section of the Act of Congress of the 30th of April, 1790, providing that the forgery of, or the uttering and publishing of, any forged "certificate, indent, or other public security," shall be punished by death, is repealed by the 17th section of the Crimes Act, of the 3d of March, 1825, which enumerates as the subjects of forgery, an "indent, certificate of public stock, or debt, or treasury note, or other public security of the United States, or any letters patent," &c., and declares that the punishment, on conviction, shall be fine and imprisonment.

A posterior statute, inconsistent with and repugnant to the provisions of a prior one, operates as a repeal of the old statute, without any express words to that effect.

A military land warrant is neither an indent nor a public security of the United States, within the meaning of the act of Congress of 1825.

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Words and phrases used in statutes, must be understood in the sense intended by the law-maker, where that can be ascertained with reasonable certainty.

If general words in a statute follow an enumeration of particular cases, they are held to apply only to cases of the same kind as those expressly mentioned.

The forgery of a land warrant, not being embraced, either expressly or by fair implication, in any act of Congress, there is consequently no jurisdiction to punish; and a motion to quash an indictment for such forgery will be sustained.

S. Mason, District Attorney for the United States.

H. Stanbery and *S. W. Andrews*, for the defendant.

OPINION BY JUDGE LEAVITT.

This motion is urged on the ground that the instrument or paper alleged to have been forged, is not embraced, either expressly or by fair construction, in any act of Congress, defining and punishing the crime of forgery. If this position is sustainable, it is quite clear this motion must prevail. This court has no common law jurisdiction of crimes, and therefore no power to adjudge any act criminal, not declared to be so, by statutory enactment.

This indictment contains four counts. The first charges the forgery of a Military Land Warrant, averring it to be "a public security of the United States." The second charges the forgery of such warrant, with the averment, that it is "a certificate of a right to locate one hundred sixty acres of the lands of the United States." The third and fourth counts charge the uttering and publishing of the instrument, as described respectively in the first and second counts.

It is insisted, in the first place, in opposition to the motion, that the charges set forth in the several counts of the indictment, are within the provisions of the 14th section of the act of Congress of the 30th of April, 1790, 1 vol. Laws of the U. States, p. 115. This section provides for, and pun-

ishes the forgery of any "certificate, indent, or other public security," or the uttering and publishing any such forged instrument; and affixes to any of these crimes, the penalty of death.

There can be no doubt, that if this section is now in force, the forgery alleged in the indictment, and the uttering and publishing the forged instrument set forth, are within its terms. The term certificate, as used in that section, is sufficiently comprehensive to embrace the land warrant described in the several counts. This instrument is substantially a certificate, emanating from the proper officer of the government, setting forth that the person named therein, is entitled, on the ground of military service, to locate one hundred and sixty acres of the lands of the United States, subject to entry at private sale.

But it is contended that the section referred to, is impliedly repealed by the 17th section of the Crimes Act of the 3d of March, 1825, 4 Vol. Laws of the U. S., p. 119. And this presents the first question for the decision of the court in the consideration of the pending motion.

The act of 1825 contains no clause, expressly repealing any part of the act of 1790. There is a provision in the 26th section of the former act, to the effect that all prior laws inconsistent with its enactments, are repealed. This, however, is only declaratory of the principle long since settled, that a posterior statute inconsistent with, and repugnant to, the provisions of a prior one, operates as a virtual repeal of the old law. The only inquiry arising here, is whether, under the operation of this rule, the 14th section of the act of 1790 is abrogated or superseded by the act of 1825.

By the terms of the 14th section of the old law, the instruments or papers of which forgery may be committed are, a "certificate, indent, or other public security." By the 17th section of the later act, the specification is extended, and embraces any "indent, certificate of public stock, or debt,

treasury note, or other public security of the United States, issued or granted by the President of the United States, or any bill, check, draft for money, &c.

A comparison of these two sections seems to warrant the conclusion, that it was the intention of Congress, in the enactment of the latter, to repeal the former. There are several considerations clearly sustaining this inference. In the first place, it may be noticed, that the act of 1825 contains in its enumeration of instruments of which forgery may be predicated, the term *Indent*, precisely as used in the act of 1790, and without the semblance of reason that it was intended to be understood in any different sense. Now, if it was the intention of the law-making power, in the passage of the act of 1825, merely to add to, and enlarge the specifications of the old law, with the design that both should co-exist, it is not easy to perceive why the term *Indent* should have been inserted in the last law. There is certainly no foundation for the inference, that Congress intended the forgery of this instrument should be punishable under two different statutes, in force at the same time. The same remarks apply, with equal force, in relation to the terms, "other public security." These words occur in the act of 1790, and are also found in that of 1825. It is clear, too, that the use of the term *certificate*, as it appears in the two acts, is pregnant with meaning as to the intention of Congress in the later enactment. In the old law, the word is used in its most unlimited sense, and fairly embraces any instrument which, by the most liberal interpretation, could be called a certificate. In the act of 1825, the same term is used, but with additions deemed necessary to the clearness and precision demanded in all statutes defining and punishing crimes. Unlike the term *Indent*, which had a specific meaning, and could extend only to a single instrument known to the government, the term *certificate* would include a numerous class of public papers; and its use, without any restrictive additions, would leave

an almost unlimited scope for judicial construction. It was, doubtless, from considerations of this kind, that Congress, in the act of 1825, carefully restricted the term to a "certificate of the public stock or debt;" intending by the very full specification which follows of the instruments which were to be the subjects of forgery, to embrace all for which provision was deemed necessary.

There is still another consideration, showing very conclusively, the intention of the legislature to supersede the section of the act of 1790, referred to, and that the two sections under review cannot stand together. By the section of the former law, under which, it is argued, this indictment may be sustained, the penalty, on conviction of the crime of forgery, is death. By the act of 1825, the milder punishment of fine and imprisonment is substituted. While it is conceded that the latter statute abrogates the death penalty provided for by the old law, it is insisted that this change does not operate as a repeal of that part of the section which defines the crime. It is doubtless a common exercise of legislative power and discretion, to increase or lessen the punishment of a crime provided for, and defined by a previous statute. But, where that object alone is contemplated, it is usual to provide simply for such a change of penalty, without any attempt to change or interfere with the body of the statute. And this is effected by a clear and intelligible declaration of the purpose of the legislature, which leaves no doubt as to the object intended. In the case now under consideration, we find the provisions of the former law materially changed in other respects than the change of penalty. All the instruments, the forgery of which is punished by the old law, are enumerated in the new, with many additions. This fact, in connection with the change in the penalty, points clearly to the conclusion, that the act of 1825 was designed as a full substitution for that of 1790, and by fair implication, repeals it.

It is claimed, however, in the argument, that if the act of 1790 is not in force, the forgery charged in the indictment is punishable under the act of 1825. To the examination of this point, the attention of the court will now be directed.

The substance and character of the instrument alleged to have been forged, have been already noticed. It is, in brief, a certificate that the person named in it, is entitled to locate 160 acres of the public lands. Is this instrument within the terms and scope of the act of 1825, defining and punishing the crime of forgery? The enumeration of instruments, the forgery of which is provided for by that law, and within which, it is argued, a land warrant may be included, embraces an *indent*, *certificate of public stock or debt*, *treasury note*, *or other public security*, &c. Is a land warrant an indent? It is insisted in the argument, that this term, in its general and comprehensive sense, signifies any contract or obligation in writing, and that a land warrant may, by fair construction, be embraced within its scope. It is true, the word *indent* is used by English lexicographers, in the sense contended for; but it is clear, it was not used in that sense, either in the act of 1790 or 1825. Referring to Webster's Dictionary—certainly the highest authority on questions of this kind—we have an intelligible clue to the meaning of the word, as used and understood in this country, by our statesmen and legislators. It is defined to be a certificate issued by the government, at the close of the revolutionary war, to the public creditors. It is clear, a land warrant is not within this definition. And recognizing the soundness of the rule, that terms and phrases employed in statutes must be understood in the sense intended by the law-maker, where that can be ascertained with reasonable certainty, the conclusion follows, that the instrument set out in this indictment is not an indent.

But it is strenuously urged, that a land warrant is included in the more comprehensive language of the statute,

namely, "*other public security of the United States.*" In one sense, doubtless, any paper emanating from the government, creating on its part an obligation to perform an act, and a corresponding right in behalf of an individual, may be regarded as a "public security." But, in the opinion of the court, it would be in violation of every safe principle of construction, to give to it this far-reaching import. The term, public security, as used in the legislation of Congress, and in its popular acceptance, has a fixed and determinate meaning. It is simply a certificate, or instrument issued by the proper officer, under the authority of law, evidencing the pecuniary indebtedment or liability of the government to the holder. Standing by itself, and without any light thrown upon it by its collocation, and association with other terms used, this must be viewed as the utmost extent of its signification; especially, when occurring in a penal statute requiring, by a long sanctioned principle, great strictness of construction.

If, however, there was room to doubt the correctness of this conclusion, the sense in which these terms were intended to be used, in the statute under consideration, is quite obvious from their connection with those immediately preceding them. A class of instruments, the forgery of which is made punishable, all referring exclusively to evidence of pecuniary indebtedment, or obligation, are grouped together, followed by the comprehensive words, "or other public security." The words which immediately precede these, are, *an indent, certificate of public stock, or debt, or treasury note.* Now it is a well settled rule of construction, that "where general words follow an enumeration of particular cases, such general words are held to apply only to cases of the same kind as those which are expressly mentioned." Smith's Com. sec. 740. It would certainly violate the rule, to give to the words *public security* a meaning so expansive as to embrace anything not kindred to the instruments immediately

preceding, in reference to which those words are comprehensively used. And that they were intended in this restrictive sense, and not as general words, covering any possible omissions in the specifications contained in the whole section, is obvious from the fact, that they are followed by an enumeration of many other instruments, the forgery of which is provided for. In any other view of this section, the object of the legislature in setting forth, with such studied particularity, what were intended to be subjects of forgery, would be wholly defeated, and a boundless field opened for judicial construction.

Upon the whole, the court is led satisfactorily to the conclusion, that, in reference to the paper described in the indictment, there is an omission in the legislation of Congress, which cannot be supplied by any just exercise of judicial discretion. If the law does not declare the forgery of a land warrant to be a crime, this court cannot hold it to be so. It possesses no legislative power; and the exercise of such a power, under the name of judicial construction, would be nothing less than usurpation. It is required by the theory of our government, and is essential to the preservation of the rights of the citizen, that the apportionment of power to the co-ordinate branches named in the constitution, should be rigidly observed in each. And it is better that crime should go sometimes unpunished, than that this cardinal principle should be violated.

The pending motion is not based on any technical exception to the frame and structure of the indictment. In such cases, courts reluctantly exercise the power of quashing an indictment, and will not do so, unless the defects alleged are palpable, and cannot be remedied by a liberal and enlightened application of acknowledged principles of law. But the present motion goes to the jurisdiction of this court. And as there is a defect of power to punish in the event of a trial and conviction, its plain duty is, in this incipient stage

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of the proceeding, to quash the indictment, and thus relieve the accused party, however guilty in fact, from the jeopardy in which he is placed.

GOODHUE ET AL. v. MOSES R. BARTLETT.

Where a witness swears positively to the handwriting of an individual, it is sufficient.

The question as to the source of his knowledge must come from the other party.

If a deposition be taken under the act of Congress, in the absence of the party, he should take the deposition again, if not satisfied with the examination.

Where a witness swore to certain items charged, of which he had no personal knowledge, his statement was overruled.

Mr. *Stanbery* for plaintiffs.

Messrs. *Ewing* and *Thurman* for defendants.

OPINION OF THE COURT.

This is an action of *assumpsit*. The plaintiffs being commission merchants in New York, the defendant, having consigned to them a large amount of pork, drew several drafts upon them, all of which were accepted and paid. On the final adjustment of the account, there appeared to be a balance due to the plaintiffs of twenty-eight hundred dollars. To recover this balance this action was brought.

A great number of drafts were produced in evidence, purporting to have been drawn by Bartlett and paid by plaintiffs, which were charged in the accounts. Robert Hewett, a witness; was sworn, who stated he was book-keeper of the firm, and he swears that the accounts of sales of provisions shipped by Bartlett to the plaintiffs, to be sold on commission, is an accurate account as recorded in the books of the company; and also of the charges and disbursements which were

all actually paid; and also that the charges of interest and commissions were the customary charges, &c.

The drafts referred to were drawn by M. R. Bartlett, one by Joseph Neville in favor of said Bartlett; and are produced by witness, and are stated in the accounts from the letter H. to W. The handwriting of Bartlett was admitted on all the drafts, except the one drawn by Neville. To prove the signature of Bartlett on that draft, the deposition of Hewett was taken, who swore that the draft was indorsed by Bartlett.

The defendant objected to this deposition, because the witness does not say that he was acquainted with the handwriting of Bartlett, or had ever seen him write. But the court overruled the objection, observing, that the source of the knowledge is proper to be inquired into, but when he swears to the fact, it must be received as competent. The other side may examine whether he has ever seen the party write, or has corresponded with him, &c., but this is not necessary to be inquired into by the person taking the deposition.

In *Slaymaker v. Wilson*, 1 Penn. Rep. 216, "the deposition of a witness who swore positively to her father's hand, was rejected, because she did not say how she knew it to be his hand."

But in *Moody v. Rowall*, 17 Pick. 490, such evidence was, (Mr. Greenleaf in his Evidence, 1 vol. p. 612, note 1,) "very properly held sufficient, on the ground that it was for the other party to explore the sources of the deponent's knowledge, if he was not satisfied that it was sufficient."

It is no answer to this, that the party who objects to the deposition was not present when it was taken. If the deposition were taken under the act of Congress, without notice, the defendant might have taken it again. That part of the statement of the witness which relates to charges in the books, of which he had no personal knowledge, is overruled.

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The property was shipped by the way of New Orleans, and the commission merchants, at that place, drew on the plaintiffs for warehouse charges, which drafts were paid. These charges were the same in amount as usual in such cases. This evidence was objected to, unless the drafts were produced, the charges were examined and entered in the book. The court overruled the objection and admitted the evidence.

The jury found the balance for the plaintiffs. Judgment.

CIRCUIT COURT OF THE UNITED STATES.

ILLINOIS—DECEMBER TERM, 1850.

WILLIAM HOLDEN v. WILLIAM COLLINS.

Certain statutes of limitation protected all persons who were in the actual possession of land under claim and color of title made in good faith, and who, continuing in such possession for seven successive years, paid all taxes on the same during that time; and also protected all persons who were in possession for seven years, by actual residence on the land, and who had a connected title in law or equity, deducible of record from the State or from the United States, or from any public officer or other person authorised to sell the land for the non-payment of taxes, or under any order, judgment, or decree of a court of record. A person purchased a tract of land at a tax sale in 1839. The defendant claimed, by meane conveyances executed in 1839 and in 1840, from the purchaser, and had been in actual possession, and had paid taxes for seven successive years prior to the commencement of the suit. But, though the purchaser at the tax sale was entitled to a deed in 1841, none was actually made by the officer till the first day of June, 1850, after this suit was brought: Held, that the defendant was not within the purview of the statutes, and was not protected by them.

The title deducible of record, and the claim and color of title contemplated by the statutes, was the deed of June, 1850, and that having been made under a sale which the Supreme Court of Illinois has decided to be illegal, it could not relate back so as to protect the possession of the defendant.

It seems that the rule would have been different, if the deed had been made in 1841 to the purchaser at the tax sale, and the defendant had obtained the purchaser's title, and had been, for seven years, in actual possession of the land, made and held in good faith under that title, though in point of law the sale was illegal.

E. N. Powell for plaintiff.

H. O. Merriman for defendant.

OPINION OF JUDGE DRUMMOND.

This is an action of ejectment, which has been submitted upon an agreement as to the facts, and a written argument has been filed by the counsel.

The plaintiff claims title to the land in controversy through a patent from the United States, dated Dec. 2, 1818.

The possession of the defendant at the commencement of the suit is admitted.

The defendant claims title to one hundred and twenty acres, parcel of the premises described in the declaration under a sale made March 4, 1839, for the taxes of 1838, at which sale one A. H. Fash was the purchaser. It is conceded that this sale comes within the rule laid down by the Supreme Court of Illinois in the cases of *Graves v. Bruen et al.*, 11 Illinois R. 431, and *Tibbetts v. Job et al.*, lb. 453, the land not having been listed in conformity with law.

A. H. Fash, the purchaser, conveyed the land to a third person on the 18th of May, 1839, who conveyed it to the defendant, March 16, 1840. But there was no deed made to the purchaser at the tax sale till the first day of June, 1850. It is not stated, but it may be presumed, that the claim of the defendant was of that kind, that the after acquired title of the original purchaser would enure to his benefit—if of any validity.

The defendant had been in possession of the land by actual residence, and had paid the taxes, for seven successive years prior to the commencement of the suit.

The question is, whether the defendant was in possession and had paid taxes under claim and color of title, or had a connected title in law or equity, deducible of record, or from any public officer of this State, as contemplated by the acts of 1839 and 1835. Rev. Laws of 1845, 104, 349, 350.

When the defendant went into possession, his title was a conveyance by deed from the purchaser at the tax sale, and

by mesne conveyance to himself, but there was no deed from the proper officer to the original purchaser. It is clear, therefore, when he took possession, he had no title deducible of record from this State or the United States, nor from any officer or other person *apparently* authorized to sell the land for taxes, nor from any sheriff or other person authorized to sell the land on execution. That title did not vest in him by operation of law until the deed was made to the original purchaser on the 1st of June, 1850, long after this suit was brought. And besides, the language of the law of 1835, (Rev. Statutes of 1845, 349, secs. 8, 11,) is express, that when the possessor shall acquire title *after* the time of taking such possession, the limitation shall begin to run, not from the time of taking possession, but from the time of acquiring title.

Neither had the defendant claim or color of title as was required by the law of 1839. A construction of this statute, and of the meaning of these words, has been given by the Supreme Court of this State, and that is a rule of decision for this court. In *Irving v. Bunnell*, 11 Illinois R. 402, the court say, by "claim and color of title made in good faith," is meant a title which, tested by itself, would be good; such a one as would authorize the recovery of the land when unattacked—that is, a *prima facie* title.*

If we apply this rule to the facts of this case, it will be manifest that the defendant had not such a claim or color of title. If he had sought to recover the land, his sole title was by a deed from the purchaser at the tax sale, and, *prima facie*, he had no title whatever; he had at most a right or claim to call for a title.

But it is contended that this deed, though not executed till 1850, operates back by relation to the time when it was demandable, March 4, 1841, and by connecting it with the pos-

* It is understood that the Supreme Court of the U. S. gave a similar construction to the statutes in a case to be reported in 10 Howard.

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session and payment of taxes for seven years, a claim and color of title, and a title deducible from a person authorized to sell the land for taxes, are made out. It is said that when the land is unredeemed at the expiration of two years, the deed was demandable of right, and that was the inception of the claim, the deed itself being the mere evidence of title. In a case decided at the last June term of the court, this point was discussed, and it was held that the doctrine of relation did not apply to such a case as the present.

When an attachment is levied on real estate, and is followed up by judgment, execution and deed of the sheriff, the title relates back to the levy so as to supersede all claims subsequent to the levy, because the levy, if duly made, becomes a lien upon the property. If a judgment is rendered which becomes a lien upon real property from the last day of the term, and execution is issued within a year, though no sale may take place, or even levy, and other subsequent judgments may be rendered which also become liens upon the land, still, if the first judgment creditor makes his levy, and sells and obtains his deed, it relates back so as to cut off all intervening judgments. If a mortgage is given on a tract of land, and is duly recorded, though other mortgages and judgments may afterwards bind the land, if the first mortgagee forecloses his mortgage, sells the land, and takes a deed, it relates back to the time of the mortgage. But in none of these familiar cases can it be said that they relate in such a manner as that the statute of limitations will begin to run, so that if the original title fails, a party can plead that as a defense to an action brought against him, unless, indeed, the original title is that *prima facie* title contemplated by the statute. So in this case, a purchase at a tax sale, and a deed by the officer, may relate back so as to override certain intervening claims upon the land sold ; but it has not the magic power of making the statute of limitation run by relation. Suppose a man is a purchaser at a sale upon an ordinary execution, of

real property. He pays the purchase money, his name is indorsed upon the execution, the fifteen months expire, he is entitled to his deed, but without it he brings his action of ejectment for the recovery of possession of the property. Can he recover it in a court of law? The mere statement of the case is an answer. It is the deed that conveys the property under our law. That is the title deducible of record which our courts recognize. If the doctrine contended for in this case were to prevail, deeds at tax and other sales would be of no further use than as a convenient and satisfactory method of showing that a title had vested. And if it should happen, in a given case, that none had ever been executed, the omission might be readily supplied in various ways ; or it might be executed even after the trial was begun, and the doctrine of relation would cure all defects. It is easy to see that to adopt such principles as these would be attended with the most serious consequences. It is a refinement which is not sanctioned by our statutes of limitation ; they do not recognize the subtle distinction between the title and the evidence of title ; they follow, in this respect, the ancient highways of the law, and when title is referred to, something evidenced by a written instrument is intended, or, at least, something recognized as title by the courts of the country.

It is unnecessary to advert to the question as to what would be the effect of the deed of 1850, if objected to on the ground of its being executed after suit brought, because, even admitting it, the result would be the same, and it being conceded that it is invalid and illegal, in no possible way can it avail the defendant in this action.

RUSSELL v. TOPPING ET AL.

A person mortgaged certain tracts of land to the plaintiff, and afterwards mortgaged some of the tracts to the State Bank of Illinois. The plaintiff having foreclosed his mortgage, the court decreed a sale of the mortgaged premises. At the sale the plaintiff and the bank were competitors in bidding, but the bank became the purchaser of a lot not included in its own mortgage, in order to protect itself and prevent the property from being sacrificed. By its charter the bank was prohibited from purchasing real estate, except what was required for its business, or such as was mortgaged or conveyed for debts, or such as had been purchased by it on judgments, or obtained on debts: Held, that the bank had not the legal capacity to acquire the title to the lot at the sale.

The plaintiff received the purchase money, and the mortgagor being otherwise indebted to him, he brought suit against him, recovered judgment, issued execution, levied on and sold the same lot. The plaintiff purchased the lot at this sale, and received a deed from the proper officer. The plaintiff, notwithstanding his receipt of the purchase money, has the right to contest the validity of the sale to the bank.

The plaintiff and the bank being competitors at the sale, and the plaintiff having in no way induced the bank to bid in the property, the law of estoppel *in pais* does not apply to the case.

By the common law every corporation had the right to purchase, hold, and convey real estate. This right has been restricted in England by the statutes of mortmain. In modern times, however, the legislature generally prescribes in the charter some limits to the power of a corporation to purchase and transfer real property.

It is a principle universally acknowledged, that a corporation can only act in the manner indicated in its charter. Any thing absolutely prohibited by its charter, if attempted to be done, is a nullity.

A title by deed implies a contract, or at least, competent parties. A deed to a person having no existence, is generally inoperative, and passes no title from the grantor. If a man grant his estate to an imaginary corporation, no title passes, and it is precisely the same if it is granted to a real corporation, rendered incapable by its charter, of taking the grant. As to that particular faculty, it is not a corporation.

Whatever may be the rule in some of the States, where the doctrine of strict foreclosure prevails, in Illinois, the uniform practice both at law and in equity is, to order a sale of the mortgaged premises.

The modern authorities regard a mortgage merely as a security for the debt, and until a sale takes place under an order of the court, the title to the mortgaged property is in the mortgagor, subject to the incumbrance.

Messrs. *Billings & Parson* for plaintiff.

Messrs. *Davis & Edwards* for defendants.

OPINION OF JUDGE DRUMMOND.

This is an action of ejectment brought for a tract of land in Madison county.

A question as to the admissibility of certain depositions taken on the part of the defendants, which the plaintiff seeks to exclude, has been argued before me, and this, by an understanding between the parties, has brought up directly for consideration all the merits of the cause, most of the facts upon which the controversy is to turn, being matters of agreement.

The opinion of the court is desired upon the law of the case.

It appears that a man by the name of Howard, being indebted to the plaintiff, in 1835 gave him a mortgage on some real property to secure the debt, which included the tract in question.

The plaintiff in 1841 foreclosed his mortgage by a proceeding on the equity side of this court. The State Bank of Illinois was made a party defendant, and filed an answer to the bill, alleging that Howard was largely indebted to the bank, for which indebtedness a mortgage had been given by Howard, but subsequent to that of the plaintiff, and which included several parcels of land covered by the plaintiff's prior mortgage, but not the lot in controversy. At this time Howard was insolvent, and the bank asked that the lands not included in their mortgage should first be sold to pay the plaintiff's debt, and that the lands included in the mortgage of the bank (and which were also in the plaintiff's mortgage) should be sold only in the event of the other lands not being sufficient to pay the plaintiff's debt. The court decreed accordingly, and ordered, that unless the plaintiff's debt were paid within twenty days, the land should be sold by a com-

missioner. It was sold in pursuance of the decree. At the sale the bank purchased the tract in controversy, and a deed was made to the bank by the commissioners. The defendants claim through the bank. The plaintiff received the purchase money paid by the bank. Howard being liable to the plaintiff for other indebtedness, suit was brought against him by the plaintiff, judgment recovered, execution issued, and the tract in question levied on and sold. At that sale the plaintiff was the purchaser, and he now holds a deed for the premises. Both parties claiming through Howard, his title is not questioned.

It is admitted that this tract of land was not required for the accommodation of the bank in the transaction of its business, and that the same was not mortgaged to the bank, but that the only title held by the bank was by virtue of the sale made under the decree already mentioned.

The possession of the defendants is also admitted.

The title depends upon the validity of the sale made to the bank under the decree. Could the bank become the purchaser of the lot in question at that sale? The bank was a corporation created by an act of the legislature of Illinois, passed 12th Feb., 1835, the 5th section of which was as follows: "The real estate which it shall be lawful for said bank to purchase, hold, and convey, shall be: 1st. Such as shall be required for its immediate accommodation in the transaction of its business; or such as shall have been mortgaged to it in good faith by way of security for loans previously contracted, for money due; or, 2d. Such as shall have been conveyed to it in satisfaction of debts previously contracted in the course of its dealings; or, 3d. Such as shall have been purchased at sales upon judgments, decrees, or mortgages obtained or made for such debts; and said bank shall not purchase, hold, or convey real estate in any other case, or for any other purpose," &c.

The plaintiff contends that the purchase by the bank was made in violation of the express provisions of the charter, and was consequently void.

It is admitted by the defendants, that it was contrary to the letter of the law, but it is insisted it comes within the equity of the statute, and even if this be not the case, the plaintiff is estopped from controverting the title of the bank.

By the common law every corporation had the right to purchase, hold, and convey real property. This right has been very much restricted in England by various statutes, passed from time to time, usually called statutes of mortmain. In modern times the legislature generally prescribes some limits to the power of a corporation to purchase and claim real property, by the law of its creation. The charter is the source to which we must go to ascertain whether the corporation possesses a particular power.

It is a principle universally acknowledged by all our courts that a corporation can only act in the manner indicated in its charter. Anything absolutely prohibited by its charter, if attempted to be done, is a nullity. The numerous authorities cited on the argument conclusively show this. *New York Fire Insurance Co. v. Ely*, 5 Conn. R. 560, 566, 574; *Head and Emery v. Providence Ins. Co.*, 2 Cranch 127; 8 Ohio 288; 11 Ohio 492; 9 Porter 467; 2 Kent Com. 298. Still, these authorities do not decide that we must give a narrow or illiberal construction to a charter; on the contrary, we must look to the object and intent of the law in this as in other cases, and so construe it as to carry out the object the legislature had in view in the enactment. And this very charter expressly provides that it shall be construed liberally for all beneficial purposes therein intended. But we must take it all together, and give effect, if possible, to all its parts.

The land purchased by the bank in this case, was not for a debt contracted, directly or indirectly; the only ground

upon which it has been put, is that the bank had a right to redeem the lands covered by its own mortgage, from the operation of the plaintiff's prior mortgage; that it could not redeem a part without paying the whole debt, and that the right to redeem implied the right to appear at the sale to protect itself, and prevent the property from being sacrificed; that being of the greatest importance to the bank. The object of the testimony is to show that the bank had no other motive than to protect itself, and save as much as possible from the wreck of Howard's estate, and that if the whole of the property were made available to the bank, there would yet remain a large deficit.

The plaintiff had different parcels of land bound for his debt, some of which were included in the bank's mortgage. In such cases it is a rule well settled in equity, that the party who has the double fund shall resort, in the first instance, for payment, to that parcel which is not subject to the lien of the other party. The decree was in accordance with this rule. But did this give the bank the right to buy up land not included in its mortgage, for the mere purpose of saving the land which was included? We must look at the consequences of such a principle. In every instance where a man was indebted to the bank, it might be said, that in one sense, his ultimate ability to pay the debt would depend upon his property not being sacrificed. Suppose the case of an individual against whom judgment has been recovered, which is a lien upon his real estate, the bank holding a subsequent judgment binding the same lands. The charter gives it the power, in terms, to buy the lands at judicial sales made on its own judgment; but because it is a judgment creditor, is it permitted to become a purchaser at the judicial sales had on other judgments, merely thereby to strengthen its own fund? The object of the legislature in inserting such a provision in its charter, was to confine the bank to its proper and legitimate business of banking, and to prevent it from

becoming a great land proprietor. But while this may be admitted, it is plain that to sanction the practice mentioned, would be to allow the bank to evade an express provision of law, by the questionable method of intention. In other words, the test would be its intentions, and not its acts.

An authority has been referred to by the plaintiff's counsel, which is relied upon as conclusively settling the question against the validity of the bank's purchase—a recent case decided by the Supreme Court of New York: *The Chataugue Co. Bank v. Risly*, 4 Denio 480. An examination of it will show how near it approaches the present case.

There were various judgments binding the real estate of one Sexton. The bank was a judgment creditor. The lot in question was sold on an execution issued on a judgment of older date than that of the bank, and one White became the purchaser. There was a judgment between this older judgment, and those held by the bank. The bank assigned their judgments to a creditor who held a judgment subsequent to that of the bank. This judgment creditor redeemed the land from the first sale to White, in his own name, as well as in the name of the bank. The creditor who held the judgment prior to that of the bank's, assigned his judgment to still another judgment creditor, whose lien was of the same date as his who had redeemed. This last judgment creditor also redeemed the land from the first sale to White. But neither of these persons redeemed from each other. The person who redeemed first, assigned his interest to the bank, having acted as their agent. The person who last redeemed also assigned his claim to the bank, which thus, under the law, was entitled to a deed. The sheriff executed a deed to the bank, which recited that the bank had redeemed the land as judgment creditors of Sexton. Under these circumstances, the bank brought an action of ejectment to recover the possession of the land described in the sheriff's deed, and the question arose, whether the bank could purchase the land.

The charter of the bank contained a restriction, similar, in all respects, to that in the charter of the State Bank of Illinois, and the prohibition as to real estate, was in the precise words of the charter of 1835 : " The said corporation shall not purchase, hold, or convey real estate in any other case, or for any other purpose." The court decided that the redemption of the land was only valid by virtue of the bank being the representative and assignee of the judgment next preceding its own, that being the prior lien. And, therefore, the bank was in no sense a redeeming creditor, whatever the sheriff's deed might say, or whatever was the understanding of the parties. The case was, then, the same as though the bank was the assignee of one who had purchased the land at sheriff's sale. The court held that the bank had not the legal capacity to acquire the title. For a much stronger reason the bank could not purchase directly at the sale itself. The same argument was used there that has been urged here, that the bank having other judgments against the land which might be lost unless saved by the benefit to be acquired by the purchase, the case was brought within the statute ; but the court ruled otherwise, declaring that circumstance would not bring it within the terms or spirit of the law. But an intimation was thrown out that the bank might have had the power to redeem within the equitable construction of the law.

In the case just referred to, the bank was a subsequent judgment creditor, having a lien upon property bound by a prior lien. It did not redeem, but chose to purchase at a sale made or redemption had under the prior lien. It is a stronger case than this, in favor of the bank's right to purchase, because here the bank had no lien upon the lot in controversy. It had merely the equitable right of compelling the plaintiff to resort in the first place to the property not held by the bank.

It is said, however, conceding that the bank could not purchase, hold, or convey the property ; that is, that the sale was illegal, it will not follow, the title of the bank and of its grantees is invalid, so long as no action is taken on the part of the State ; that it may be likened to the case of an alien. Formerly, an alien could not hold or inherit real property, but it has been decided that an alien could hold it till a proceeding was instituted on the part of the sovereign power to deprive him of it. This old rule of the common law is now, in many of the States, changed by legislative authority, and aliens can hold real property as well as citizens. Several authorities have been adduced to show that the same principle was applicable to corporations, as to aliens, and that under such circumstances, they, or the third person to whom they may convey, hold a title defeasible by the sovereign power alone. *Baird v. The Bank of Washington*, 11 Serg. & Rawle 418 ; *The Banks v. Poitrary*, 3 Randolph Va. R. 136 ; *Silver Lake Bank v. North*, John. C. R. 370.

But in the case of the alien, and in the authorities cited, it was so decided because the alien and the corporation could take or purchase real estate. In *Baird v. The Bank of Washington*, the prohibition was to purchase *and* hold, and the Supreme Court of Pennsylvania decided that the bank might purchase, but could not hold, as against the State alone. It was a defeasible title. In the case in Virginia, the prohibition was to hold, and the Court of Appeals decided the banks might purchase. If, however, the prohibition is absolute as to the taking or purchasing, there is an entire incapacity to acquire the title. In this case the bank could neither purchase, nor hold, nor sell real estate, except under certain circumstances. These circumstances do not appear to have existed in this case ; consequently the State Bank did not acquire any title at the sale. Where, then, was the title ? It still remained in Howard. It had not been divested. A title by deed implies a

contract, or, at least, competent parties. A deed to a person having no existence is generally inoperative, and passes no title from the grantor. Even in the case of an escrow, the title remains in the grantor till the condition is complied with, and the deed delivered, when it will relate back for certain purposes to the time when it was delivered by the grantor as an escrow. If a man grant his estate to an imaginary corporation which exists only in his own mind, no title passes, and it is precisely the same if it is granted to a corporation rendered incapable by its charter of taking the grant. As to that particular faculty it is not a corporation.

But it is contended that the decree of foreclosure divested the title of Howard. The language of the decree is in the form usually adopted in such cases—that the party be forever barred from his equity of redemption. However it may be in some of the States, where the practice of strict foreclosure prevails, that is, where the mortgagee takes the premises without a sale, in Illinois, the uniform practice, both at law and in equity, is to order a sale. It was the course pursued in this instance. It is said, if the money had not been paid within the twenty days, it might have been in the power of the mortgagee to insist on a sale. But I doubt whether he would even have had that right upon the tender of the debt, interest, costs, &c., before the sale. But there can be no doubt, if the money had been paid by the mortgagor, and received by the mortgagee before the sale, it would have extinguished the debt and the mortgage, and no conveyance would have been necessary to vest the property in Howard. To show that this view of the case is correct, it is only necessary to inquire where the title was after the event of foreclosure. It was certainly not in abeyance, for that is never true except in certain specified cases, as where the title remains in that condition till there is a grantee capable of taking, or where there is to be a grantee, *in futuro*. If the decree vested the title anywhere, it must have been in the mortga-

gee, and that would not help the defendants. The modern authorities regard a mortgage merely as a security for the debt, and with us, until there is a sale of the premises under a judgment at law or decree in chancery, the title is in the mortgagor; to say nothing of the right of the party to redeem even after sale. If the debt is paid, he can maintain ejectment; he is entitled to the rents and profits of the estate. He is, in a court of law, even, to all intents and purposes, the owner of the land, subject to the incumbrance. If the time for the payment of the money secured by the mortgage is elapsed, it can hardly be pretended, under the law as it now stands, the mortgagee can recover the possession of the land mortgaged even for the mortgagor. He must, in the first place, resort to a court of law or equity, to foreclose the right of redemption, and that is uniformly done by a sale. Besides, a court of equity usually requires a return or report to be made by the master or commissioner, of the proceedings, and in some respects, the whole matter may be considered as *in fieri*, until the acts of the master are approved or confirmed by the court. The decree in this case directed such a report to be made, and it was made accordingly. It is the sale, then, and subsequent proceedings, that divest the title. In this case there was not, in law, any sale of the property which is here the subject of controversy.

The relaxation which has gradually taken place upon the subject of mortgages, under the slow but sure progress caused by an advance in the arts of civilization and refinement, is a striking illustration of the amelioration given, by modern decisions, to the stern and inflexible rules of the ancient common law. The law of mortgages is now administered in our courts upon principles of equity and justice, which commend themselves to all.

There being, then, no sale under this decree, and the decree itself not having divested the title, it still remained in Howard.

But it is insisted, that the plaintiff cannot avail himself of these principles, because, having received the money from the bank, sound policy requires that he should not set up the illegality of the sale, and the incapacity of the grantor, to defeat the title of the bank.

The court has nothing to do with the propriety or delicacy with which parties may act. It can only look to their rights and their remedies.

The question is, Is the plaintiff estopped by the mere receipt of the money under the circumstances of this case, from contesting the sale to the bank ?

A very brief examination of this branch of the law will furnish us with an answer.

It is not pretended that it is a case of technical estoppel by matter of record, or by deed ; but it is said, it is an instance where the law of equitable estoppel, *in pais*, applies. The law of this last species of estoppel was fully investigated in a recent case in New York, *Dezell v. Adell*, 3 Hill's R. 215. The court differed in opinion as to the application of the law to that case, which was, where a party had given an officer a receipt for goods seized on execution, promising to deliver them up on a certain day, and afterwards claimed them as his own ; the majority of the court held he was estopped by his receipt. The court, however, agreed that the definition of an estoppel, *in pais*, given by Judge Nelson, in the case of *The Welland Canal Co. v. Hathaway*, 8 Wend. 483, was correct: "A party will not be permitted to deny his own acts or admissions which were expressly designed to influence the conduct of another, and did so influence it, and when such denial operates to the injury of the latter." There can be no doubt, that while the courts in recent times have been inclined to restrict the law of technical estoppel, they have much enlarged the limits of the law of equitable estoppel. But let us take the most liberal view of estoppel *in pais* possible, and apply it to this case. What act did the plain-

tiff do, or what admission did he make, which was designed to influence the conduct of the bank? How was it influenced by the plaintiff? Granting that the plaintiff's denial of the right of the defendants to the property, may operate to the injury of the bank, the other ingredients, and the essential ones, of an estoppel *in pais*, are entirely wanting. So far from the bank making the purchase influenced by anything on the part of the plaintiff, it appears that they (the plaintiff through his attorney, the plaintiff himself not being present at the sale) were competitors at the sale in bidding, and it was only because the bank bid more than the plaintiff's attorney, that it became the purchaser. Was the plaintiff bound, through his attorney, to inform the bank that it could not legally become the purchaser? Certainly not. It does not appear that the slightest act was done on the part of the plaintiff to induce the bank to buy. Admitting that a case could be so presented that the doctrine of estoppel *in pais*, would apply, so as to enable the bank to hold land not authorized by its charter—as to which I express no opinion—it would have been necessary for the plaintiff to design expressly to influence the bank in this pretended purchase; and there cannot be the least pretext of anything of the kind on the part of the plaintiff. It can, in no sense, be considered the same as if the plaintiff had himself sold land to the bank.

It only remains to consider whether the mere fact of receiving the money estops the plaintiff from denying the validity of the sale, and of the title of the bank; and it would seem as though the mere statement of such a doctrine were enough to show its unsoundness. A has a judgment against B. The officer under the execution issued upon the judgment, levies on and sells the land of A, the plaintiff. He receives the money. It is said he is estopped from denying the title of the purchaser, and proving that it was his own land that was sold. This would be the result of the doc-

trine, even if it did not go further, and by implication, make every plaintiff in an execution, when he receives the purchase money, a guarantor of the purchaser's title. This is a construction of the law of estoppel *in pais* which this court cannot sanction.

It follows, then, that it is immaterial whether the depositions were admitted or excluded, as, upon the facts which have been submitted to the court as agreed on between the parties, the law of the case would be the same in either event.

CIRCUIT COURT OF THE UNITED STATES.

OHIO—APRIL TERM, 1851.

UNITED STATES *v.* JACOB MURRAY.

Where full reparation was made for a trespass on the public lands, by purchasing the land in part, and by paying the purchaser of the other part, for the trees cut on it, a nominal fine only was imposed.

The trespasser seemed to have no intention of defrauding the public.

District Attorney of the United States.

OPINION OF THE COURT.

This is an indictment for cutting oak and other timber on the land of the United States.

The defendant confessed that he was in the employment of an individual, and cut, say, two thousand trees for ties for railroad. That the man who employed him intended to enter the land, and did enter two quarters of it, but the other quarter was entered by another individual. That he paid the individual who entered the quarter section for the trees cut on it. And the other entry covered the land on which the other trespass was committed.

The trespass was not an aggravated one, and, in fact, did injury to no one, that was not satisfactorily settled. The

United States v. Henry King.

land was sold at the price fixed by law, having been previously offered, but not sold at public sale. Upon the whole, the court will impose a nominal fine, as there was no intention, it would seem, to defraud the public. The defendant was fined five dollars and costs.

UNITED STATES v. HENRY KING.

On a charge of counterfeiting coin, proof of the fact that a quantity of spurious coins, with tools and instruments for the manufacture thereof, was found in the defendant's possession, will warrant the presumption of his guilty agency, unless negated by other facts in the case.

On an indictment under the section of the act of Congress, providing a penalty against any one who shall *falsely* make, forge, or counterfeit any silver coin, &c., it must appear that it was the intention of the party, in making such coin, fraudulently to pass them as genuine.

If it appear that the counterfeit coins were made for any other purpose—though that purpose may not be defensible in a moral aspect—the party is not guilty of the offense contemplated by the statute.

Mr. *Mason*, District Attorney for the United States.

Messrs. *Stanbery* and *Norton* for the defendant.

OPINION OF JUDGE LEAVITT.

The defendant is charged with the offense of making certain counterfeit coins of the United States. The law on which the indictment is framed provides a penalty against any one who shall *falsely* make, forge, or counterfeit, any silver coin in the resemblance and similitude of any silver coin of the United States, or any foreign silver coin, made current by law.

It is not necessary to detain the jury by re-stating the evidence at length. The material facts are, briefly, as follows : Some time in the year 1850, some of the police officers of the city of Cincinnati, visited the rooms occupied by the defendant, in that city. In one room there was a chest, in which

were found, at the bottom, and interspersed with the sheets and articles of clothing which it contained, a number of counterfeit coins, consisting of American half dollars and dimes. Some moulds made of plaster, intended for the manufacture of coins, were also found in the chest, and in the room; but these were not complete, and had never been used. The witnesses also discovered, behind a curtain in the same room, a galvanic battery, and some other articles, apparently designed to be used by a showman. The half dollars, six or eight in number, were stuck or glued together, in the manner in which they are used by exhibitors of magical performances; and thus arranged, the mass is called the magical ball or ring. Neither the room or the chest was locked when the officers entered to make the search. The defendant, and a man whose name is Freely, were in the room when the officers entered, and during the examination. When the officers made known the object of their visit, Freely remarked, that there was no counterfeit coin there, that he knew of; and when found, said the defendant had nothing to do with it. The trunk and its contents were claimed by the defendant as his property, who said, when the coins were found, that he was getting up a public exhibition, and that they were intended for use in that way. There is no proof that the defendant passed, or attempted to pass, any counterfeit coin.

On the part of the defense, it is in evidence, that the defendant has lived about three years in Cincinnati, during the greater part of which time he was in the employ of Mr. Farnum, who is engaged in the manufacture of hose. It also appears that the defendant was in the habit of giving occasional public exhibitions of magical performances. Three witnesses state, that they have been present at some of the defendant's performances, in which he used the magical ball or ring, before described. One witness—a distinguished professor of magic—states, that it is usual for those engaged

in that business, to use counterfeit dimes or other coins, to avoid the losses to which they are liable from the use of genuine coins. Several witnesses—some of whom have been well acquainted with the defendant for ten or twelve years—testify to his general good character.

These being the material facts in evidence, it will be for the jury to decide, whether the charge in the indictment is sustained. To justify a verdict of guilty, the jury must be satisfied that the defendant made, or aided in making, one or more, of the counterfeit coins described in the indictment. And it may be remarked, that the guilty agency of the person charged, in the manufacture of spurious coins, may be satisfactorily made out, without positive proof of the fact. Circumstances may be adduced, sufficient of themselves, to justify a presumption of such agency. The possession of a quantity of false coins, upon the person, or the premises of the party implicated, warrants the inference that he made them. And this inference is greatly strengthened by proof, that instruments or tools, designed for the manufacture of such coins, were found in the possession of the accused person. But this presumption of guilt may be negated by evidence showing that the false coins, though manufactured by him, were made for an innocent purpose, or a purpose not rendering the act criminal under the provisions of the statute on which the prosecution is based. It will, therefore, be a proper inquiry for the jury, if the evidence satisfies them that the defendant made the coins in question, whether there was the guilty intent to pass them as genuine. The intent with which an act is done, gives it its true legal character, and in general, is a necessary element of crime.

In this case it is insisted that if the defendant made the spurious coins, it was not for the purpose of fraudulent utterance, but to aid him in his performances as a professor of magic. If the jury shall come to the conclusion, from the evidence, that this was the defendant's purpose in making

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the coins, it is very clear, their verdict must be one of acquittal. The penalty of the statute on which the indictment is framed, is denounced against any person who shall *falsely* make or counterfeit the coin of the country. The use of the word *falsely* in the statute implies, that there must be a fraudulent or criminal intent in the act. And the statute contemplates no other intent, in the act of making, as necessary to constitute the crime, but that of disposing of, or passing the spurious coin, as true and genuine. If made for any other purpose—though that purpose is not a justifiable or defensible one in a moral aspect—the party does not incur the legal guilt contemplated by the statute.

It is true beyond all question, that the coin of the country should be scrupulously guarded by law. The social and commercial interests of any people, are involved in its preservation from adulteration and forgery. And it is competent for Congress, by suitable enactments, to protect the sacredness of the metallic currency of the country, by a provision that shall punish the act of counterfeiting it, for any, even an innocent purpose. But the existing law checks, does not reach such a case.

The jury returned a verdict of not guilty.

HENDRICKSON v. HINKLEY.

Where a case was properly examinable at law, and a trial at law has been had, and no exception to the ruling of the court, chancery can give no relief.

Chancery cannot revise a case at law, where there was no obstruction to a full investigation of the merits.

Even if a party neglects to make a full defense, as might have been done, it is no ground for the exercise of an equitable jurisdiction.

A party, in such a case, can obtain a remedy by a bill of exception to the ruling of the court, or a motion for a new trial.

Hendrickson v. Hinkley.

Mr. *Probasco* for complainant.

Mr. *Mills* for defendant.

OPINION OF THE COURT.

This is a bill in chancery, in which the complainant asks relief against a judgment at law on two grounds :

1. That the complainant's claim be set off against the judgment ; or,
2. That the defendant's judgment may be subjected to the payment of the complainant's accounts.

Some years since a contract was made between the above parties, in which Hendrickson, in company with — Campbell, since dead, purchased from the agent of Hinkley, a certain number of imported hogs, for which they agreed to pay a high price, on account of the breed of the hogs. The amount of the purchase was about three thousand dollars. A part of the consideration was paid, and the balance not being paid, suit was commenced by Hinkley. Notes, at the time of the contract, were given for the hogs.

The defendants set up in defense of the action, that they had been influenced to make the purchase by the fraudulent representations of the agent of Hinkley. That several of the hogs, for which they paid the highest price, were worth nothing, and could not be sold in the market, at any price. Also, it was alleged that payments had been made, and that certain expenses had been incurred by the defendants in keeping the hogs, &c., chargeable to the plaintiff.

At the trial the jury found for the plaintiff the sum of
in damages.

A motion was made for a new trial on the ground of surprise, at the trial, and for other causes. The court overruled the motion, and entered a judgment on the verdict, and the present bill was filed for relief.

There is no matter set up in the bill which might not have been considered in the action at law. The account set up

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was connected with the purchase of the hogs, and every item for which a credit on the judgment is claimed in the bill, grew out of that transaction. All these matters were examinable at law. After a full and deliberate trial at law, a verdict found for the plaintiff, a motion for a new trial was submitted on grounds stated. The court overruled the motion. No exception was taken to the ruling of the court on the trial. Under such circumstances a court of equity can give no relief. A court of equity will not revise a proceeding at law, where the subject matter was proper for a court at law. In such a case, equity has no jurisdiction.

If the defendant failed to set up in his defense, what he might have done at law, there is no remedy. The laches of a party lays no foundation for the interference of a court of equity. There appears to be no ground on which the present bill can be sustained, and the relief prayed for given. The bill is dismissed at the costs of the complainant.

PETER DRESKILL *v.* FRANCIS P. PARISH.

Mr. Parish, in proper person, moved the court in this case to retax the costs, on two grounds.

1. Because there was no service of a subpoena on Charles L. Mitchell and Andrew J. Dreskill, who appeared several terms, and were examined as witnesses.

2. Because several other witnesses were served with process, more than one hundred miles from the place of holding the court.

BY THE COURT.

The second objection is not sustainable. A witness may be summoned if within one hundred miles of the place of holding the court, though his residence be out of the district

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in which the court is held. But the subpoena runs throughout the district, the same as any other writ. The deposition of a witness may be taken who lives more than one hundred miles from the place of holding the court.

The first objection, we think, is sustainable. The compensation to a witness is allowed. If he attend voluntarily or without summons, his fees cannot be charged against the losing party. The attendance, if not summoned, is voluntary. The indorsement of accepted on the subpoena, never placed in the hands of the marshal or his deputy, by a witness, is not sufficient. Such a service would not authorize an attachment against the witness, for non-attendance. The service must be made by the marshal or one of his deputies. As no such service was made on the witnesses above named, their per diem and travelling expenses cannot be charged to the defendant, but must be taxed to the party summoning them.

JONES v. VANZANDT.

Where the cause of action is local, a reference to the "district aforesaid" named in any preceding count, is a sufficient designation of the place.

Though a State be named, which is in law a district, the reference being to the "district," a term used in the law, the reference will be held to mean the district before named, and not the State named.

If counts be abandoned, they are not for all purposes considered as stricken from the record.

As matters of reference in subsequent counts, they are held good.

Under the act of 1793, for the reclamation of fugitives from labor, if the action be for the penalty, the acts of the offender must be alleged, contrary to the statute.

This may not be necessary when the action is brought to recover damages.

Mr. Fox for the plaintiff.

Mr. Chase for the defendant.

OPINION OF THE COURT.

This cause was tried in December, 1842. A verdict being found for the plaintiff, a motion was made for a new trial, and also in arrest of judgment. The motion for a new trial was granted, at the costs of the defendant, and an intimation was given that certain counts in the declaration were defective, but there was no decision on the motion in arrest. (2 McLean 626.) The case was certified to the Supreme Court, on points of division of opinion between the judges, which, and the death of the defendant, have delayed the decision of the case until this time. The decision of the Supreme Court, on the points certified, being favorable to the plaintiff, the motion in arrest of judgment has again been argued.

As before remarked, this court at the former term, did not decide this motion, although its views were expressed in regard to the third and fourth counts in the declaration, which are the only ones that were not abandoned before the verdict was rendered. It was intimated by the court that there was a defect in these counts, in stating the place to which the fugitives escaped. The words of the law are: "When a person held to labor in any of the United States, &c., under the laws thereof, shall escape into any other of the said States," &c. And the court remarked, the allegation in these counts is, "that the slaves escaped from Boone county, and the State of Kentucky, and came to the defendant, at Hamilton county, in the State and district aforesaid." And they say, "what State and district? The grammatical reference is, to the State and district last above named in the count; and the words, Hamilton county, are not a sufficient designation. The direct reference then, is, to the State of Kentucky, which, by the law, is a district; and in this view, there is no escape alleged within the statute." It is also said: "I entertain great doubts whether the reference to the

preceding counts, as regards the escape, make good the third and fourth counts. At least there is great uncertainty in the reference." And in the conclusion of the opinion the court said : " as a motion for a new trial was first in order, and as the third and fourth counts, on which the jury found their verdict, claim only compensation for the loss of the services of the slaves for six days, and an indemnity for the expenses to which the plaintiff had been subjected," &c., the new trial was granted at the costs of the defendants, which was not accepted by their counsel.

A more mature consideration which I have since given to the case has convinced me that, after verdict, the counts may be sustained. In the caption of the declaration, the district of Ohio is stated ; and in the first count the district of Ohio is again stated as the place of venue. In the second count it is averred that the slaves, against the will of the plaintiff, " departed and went away from the plaintiff, and out of his service, at said Boone county, and came to the defendant at Hamilton county, in the State of Ohio, and the district aforesaid." And in the third count it is alleged that " unlawfully, wrongfully, and unjustly, the slaves departed and went away from and out of the service of the plaintiff at Boone county, and the State of Kentucky, and came to the defendant at Hamilton county, in the State and district aforesaid." In the fourth count the averment is, that the fugitives " came to the defendant at said Hamilton county, in the district aforesaid."

The first and second counts have been abandoned, and are consequently inoperative as the foundation of a recovery ; yet, they are not, in every sense, to be considered as stricken from the record. A reference in subsequent counts to the venue as laid in those counts, or to fix the place where the act complained of was done, may be held to be sufficient. There is no other district than that of Ohio named in the caption of the declaration, or in the first and second counts,

and a reference in the third and fourth counts to the State and district aforesaid, must be held to refer to the State and district of Ohio. This is not a strained construction, and is called for by the import of the terms used in the declaration, especially after verdict.

The other defect noticed in the fourth count was the want of averment, that the offense charged in the declaration, was contrary to the statute. In considering this objection formerly, the court said: "that it may not be necessary to adopt the formal conclusion, as is held to be necessary where the action is brought on a penalty; but it seems to me that the declaration must refer to the statute as an essential part of the plaintiff's right. I have had no time to look into the authorities extensively on this point, but, I think, from analogy, and the reason of things, the fourth count is defective in this particular."

When the case was before the Supreme Court on certified points, the court say, in regard to the sufficiency of the declaration, "no specific point, not otherwise designated, has been called to our attention, except that all the acts alleged in the declaration, are not said to be contrary to the statute. This last expression, they say, follows the concluding portion of the count, and this expression may be necessary in a penal action." This point was certified in the action against the defendant for the penalty, but the action before us is one for secreting the fugitives, by reason of which their services were lost to the plaintiff. The remark of the court would seem to imply that although the averment may be necessary in a penal action, it is not necessary where the action is not for the penalty. In one or two cases it has since been held, in an action for the value of the fugitives, that the above averment is not necessary.

Had there been no provision in the constitution or act of Congress on the subject, it is clear there could be no reclamation of fugitives from a free State, nor damages recover-

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ed for secreting them. This right, as has often been decided, must depend, as between slave States and free ones, upon treaty stipulations, or upon some general law equally binding upon States, as the Constitution of the United States, or the acts of Congress. The proviso in the act of Congress, that a recovery of the penalty should not bar an action by the master for damages, would seem to recognize such a remedy as existing at common law. The form of the action is found in the common law, but the right arises under the constitution and act of Congress. As these laws are general throughout the Union, the court, I suppose, are bound to take notice of them without any special reference to them in the declaration.

Upon the whole, I feel it to be my duty to say that the suggestions formerly made, in relation to the defectiveness of the fourth count, on further examination, are not sustained. A decision was not made, nor intended to be made, on either of the above counts. The intimations were hastily thrown out that the defects, if considered important, might be remedied at a future stage of the proceeding by amendments.

The motion in arrest is overruled, and a judgment entered upon the verdict.

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Persons undertaking to pack pork, are bound to exercise all the skill and care which the business requires.

And if any part of the pork packed prove to be unsound, the jury will ascertain whether the unsoundness was attributable to the manner in which it was put up.

The damages sustained by the plaintiffs, for whom the work was done, may be ascertained by comparing the sales of the unsound article, with the market price for a good article.

Mr. *Chase* for plaintiff.

Mr. *Fox* for defendant.

OPINION OF THE COURT.

This suit is brought on a contract made between the parties, in which the defendants agreed to cut hogs enough to make fifteen thousand pounds of prime and mess pork. The declaration charges that the pork was badly put up, that many of the barrels were injured, and several of them fell short of the weight, and damage was claimed for meat not accounted for.

The price for packing per barrel, and finding the salt, was fixed at one dollar and seventy cents; for selling shoulders per hundred pounds, sixteen cents; for selling hams, heads, and offal, two and a half per cent. Hams to be sold at four and one-half cents per pound, and lard at six and one-fourth cents. Rendering lard at thirty-three and one-third cents per one hundred pounds. And the defendants agree to give sixteen cents for each hog's head that may not be wanted in making prime pork. Six thousand shoulders were to be delivered to Holmes & Co., of Pittsburgh, they paying for the same \$2 70 per hundred pounds. Plaintiff agreed to furnish the cash to make purchases. Defendants only to pack the number of barrels which the hogs purchased should fill.

It seems from a settlement that the number of barrels purchased amounted to twelve hundred and eighty-six. And the account was balanced. From the evidence it appeared that four hundred and seventy-three barrels were injured. And the court instructed the jury to inquire into the extent of the damages sustained by reason of any want of skill or care of defendants in packing the pork.

The plaintiff's partner was present occasionally and witnessed the progress of the packing, and seemed to be well satisfied. And there is some evidence conducing to show

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that the plaintiff took the responsibility of directing in what manner the pork should be put up. So far as this evidence may go, the jury will consider it. If the plaintiffs changed the ordinary mode of packing, thus far the defendants are not answerable for damages. But, it is to be presumed that the plaintiffs relied on the skill and knowledge of the defendants in the business of packing pork.

The pork was packed, it appears, for the New Orleans market. Several barrels were sold at Cincinnati as bad pork. About fourteen thousand two hundred and thirteen pounds were sold. The defendants sent down to Louisville, as the proceeds of the unsound barrels, one hundred and ninety-nine dollars. The shipments were made on the order of the plaintiffs. The above sums the plaintiffs refused to receive. Twenty-six barrels were claimed as not accounted for. This was ascertained from the amount of pork purchased, and the amount packed.

The jury were instructed they should ascertain the damages suffered by the plaintiffs from the sale of the unsound pork at Cincinnati, comparing it with the price of good pork at the same market.

The sales of the pork at New Orleans to be compared in the same manner with the marketable price of a sound article. This will enable the jury to come to a satisfactory conclusion as to whether the pork was well put up at Cincinnati, that being the place of delivery, as to the injury, if any, the plaintiffs sustained. And if it shall appear that the loss was caused by a want of skill or care, or both, by the defendants, the plaintiffs will be entitled to the market price of good pork at Cincinnati, where the plaintiffs received the pork.

The defendants made no other contract than that the pork should be well put up, and it will be for the jury to say whether there was anything in the season, or in the transportation of it to New Orleans, which could have injured it, had it been well packed. In holding themselves out to

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the public as pork packers, the defendants were bound to use the skill in the business which such a business requires.

The jury found for the plaintiffs \$2756 63.

At a subsequent day a motion for new trial was made by the defendants' counsel, and strenuously urged. The ground was, that the jury had rendered a higher verdict than the facts authorized. It was argued that the season was very unfavorable, and that a great deal of the pork packed at Cincinnati and elsewhere spoiled. That it was impossible to expel the animal heat from the meat, before it was necessary to salt it to prevent it from spoiling. That the jury had misapprehended the facts, as, if they had found for the plaintiff at all, they could not have assessed the damages at the sum returned in their verdict.

On the other side, the plaintiffs' counsel contended that the damages should, or at least, they might have been higher. That they must have omitted some of the items claimed. And this was attempted to be demonstrated by the items of damages claimed, showing the price of the pork sold as unsound, and comparing it with the price for which a sound article sold at Cincinnati.

BY THE COURT.

There is no particular complaint as to the charge of the court. Specific charges were asked, and the court gave general instructions to the jury, embracing the points on which instruction was asked. This is a better mode, as the jury will see the views of the evidence applying to the case in connection with the law. The charge being delivered, no exception was taken to any part of it, nor was it intimated that any one of the points in the instruction prayed, had been omitted. This was necessary, if there was any objection to the instruction, as the court, by having its attention directed to the particular point noted, might correct or modify the instruction.

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Not long since, in a similar case, the court permitted an exception to be taken which had not been made when the charge was given ; and although the decision of this court was affirmed in the Supreme Court, yet it subjected the plaintiff to delay and expense. Being convinced that an error in law is a matter of strict right, I determined that a strict practice, in justice, was required ; and, consequently, where the matter of exception is not noted during the trial, a bill of exceptions will not be allowed afterwards.

In regard to the verdict of the jury in this case, if the verdict had been for a less sum, the court would not have set it aside for that cause. The jury were instructed that if they should find the defendants had been negligent in putting up the pork, the damage to the plaintiffs would be, the difference in the Cincinnati market between sound articles and those which were sold in that market as unsound. And that the pork shipped to New Orleans could only be examined at that port to ascertain its true condition when it was delivered at Cincinnati. That the Cincinnati market afforded the datum for an estimation of the damages.

After a deliberate revision of the evidence, the charge of the court, and the verdict, we are not brought to the conclusion that the verdict of the jury is against evidence.

The weather was, undoubtedly, very unfavorable for pork packing the season this pork was packed ; but the experience and skill of the defendants as packers were relied upon, and they should have acted under a knowledge of such a responsibility. Under such circumstances, the skill of the defendants is specially required. They should have declined killing the hogs, if they did not believe the pork could be saved. After this advice, had the plaintiffs directed them to kill and pack the pork, they would have been exonerated from any liability, had they put up the pork as carefully and skilfully as could be done by persons acquainted with the business.

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We do not feel ourselves authorized to set aside the verdict; the motion for a new trial is, therefore, overruled, and judgment on the verdict.

JOHN G. GOESELE ET AL. v. JOSEPH M. BIMELER ET AL.

A religious association, assuming the name of the "Separatist Society of Zoar," being unincorporated, cannot hold property in the name thus assumed.

Nor can the directors and their successors in office, appointed by the society, hold it, as the law recognizes in them no succession.

But the conveyance of land to an individual and his heirs, for the use of the society, constitutes him the trustee, and the members the cestui que trusts.

Where land has been paid for by the proceeds of the joint labor of a community, each individual, unless the contrary be made to appear, will be presumed to have an equal interest in the land.

Under such circumstances, the cestui que trusts may enter into a legal and binding contract among themselves, to relinquish their individual interests in the trust, for a common interest in the whole property, so long as they shall remain members of the association, relinquishing for themselves and their heirs all right beyond that limitation, to the property, and also all claim for their labor, they receiving during their membership, under the distribution of agencies appointed by themselves, provision for their support, of clothing, and in every other particular.

Such an agreement does not require the solemnities of a grant, but is a declaration of trust, which being in writing, is valid.

The members of the society reserve to themselves the power to alter the contract at discretion, and through its agents to sell the property, and also to admit new members on the terms of the original association; under such conditions, the contract is not void, as establishing a perpetuity.

Its continuance depends on future voluntary contracts, and not on any principle in the original instrument.

A court of equity may not decree a forfeiture.

It will relieve against a penalty, but not against stipulated damages.

Nor will a court of chancery give relief against the bona fide contract of a party, entered into for a valuable consideration.

Messrs. *Gholson* and *Quin* for complainants.

Messrs. *T. Ewing* and *H. Stanbery* for defendants.

OPINION OF THE COURT.

The complainants in this case, claim to be tenants in common in a large property in Zoar, purchased by a religious society called "Separatists," of which their ancestor was a member. From the facts stated in the pleading and evidence, it appears that in 1807 the society having suffered much persecution at Ball, in the kingdom of Wirtemberg, Germany, emigrated to the United States. They arrived at Philadelphia, in a destitute condition, where pecuniary aid was afforded them by the friend Quakers of London and Philadelphia. Whilst there, the society purchased five thousand five hundred acres of land from one Godfrey Hager, on credit, situated in Ohio, to which the charity received enabled them to go, and on which they settled, calling the place Zoar. The purchase was made by Bimeler, one of the defendants, who took the title in his own name, holding the land as he has uniformly declared, in trust for the society.

At this time the association seems not to have contemplated a community of property. The land was paid for by the proceeds of the united labor of the society.

On the 15th of April, 1819, the society entered into articles of association, prefaced by the following preamble: "The undersigned, members of the society of Separatists of Zoar, have, from a true Christian love towards God and their fellow-men, found themselves convinced and induced to unite themselves according to the Christian Apostolic sense, under the following rules through a communion of property; and they do hereby determine and declare that from the day of this date, the following rules shall be valid and in effect:"

1. "Each and every member does hereby renounce all and every right of ownership, of their present and future movable and immovable property; and leave the same to the disposition of the directors of the society elected by themselves.

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2. "The society elects out of its own members, their directors and managers, who shall conduct the general business transactions, and exercise the general duties of the society. They therefore take possession of all the active and passive property of all the members, whose duty it shall be at the same time to provide for them ; and said directors are further bound to give an account to the society of all their business transactions."

The other articles relate to the duties of the members of the society, the adjustment of difficulties which may arise among them, and an agreement that backsliding members cannot, either for property brought in, nor for their labor in the society, demand any compensation or restitution, except under the order of a majority of the society.

These articles were subscribed by the members of the society generally, and among them is found the name of John Goesele, senior, the ancestor of the complainants. Under this association, the society prospered, made extensive improvements, paid for its lands first purchased, bought other tracts and paid for them, and secured in a high degree the comforts of life. No change was made in the above articles until the 18th of March, 1824. Under the most solemn appeal to the Trinity the society then declares :

"We, the undersigned, inhabitants of Zoar and its vicinity, etc., being fully persuaded and intending to give more full satisfaction to our consciences, in the fulfillment of the duties of Christianity, and to plant, establish, and confirm the spirit of love as the bond of peace and union for ourselves and posterity forever, as a safe foundation of social order, do seek and desire, out of pure Christian love and persuasion, to unite our several personal interests, into one common interest, and, if possible, to avoid and prevent law suits and contentions, or otherwise to settle and arbitrate them under the following rules, in order to avoid the disagreeable and costly course of the law, as much as possible. Therefore,

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we unite and bind ourselves by and through the common and social contract under the name and title of "The Separatist Society of Zoar," and we agree and bind ourselves, and promise each to the other and all together, that we will strictly hold to, observe, and support all the following rules and regulations. New articles, amendments, or alterations, in favor of the above expressed intentions, to be made with the consent of the members.

ARTICLE I.

"We, the undersigned, members of the second class of the society of Separatists, declare, through this first article, the entire renunciation and resignation of all our property of all and every dimension, form, and shape, present, and future, movable and immovable, or both, for ourselves and our posterity, with all and every right of ownership, titles, claims, and privileges, to the aforesaid society of Separatists, with the express condition, that, from the date of the subscription of each member, such property shall be forever, and consequently also after the death of such member or members, remain the property of the said Separatist society."

Directors were to be elected by the society, who were authorized to take all the property of the individual members and of the society into their disposition, and to hold and manage the same expressly for the general benefit of the society, according to the prescriptions of the articles. They shall have power to trade, to purchase, and to sell, to conclude contracts and dissolve them again, to give orders if all of them agree, with the consent of the cashier, who was to be elected by the society. They were "to appoint agents and to conduct the entire provision of all and every member in boarding, clothing, and other necessities of life, in such proportion as the situation, time, and circumstances may require." And the members bound themselves to obey the orders and regulations of the directors and their agents. The

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children of the members during their minority, were to be subject to the control of the directors, but without the votes of a majority of the society, they cannot bind apprentices out of the association.

The directors are required to take charge of inheritances of deceased members as universal heirs, in the name of the society; to investigate and settle disputes among the members, an appeal being allowed to a board of arbitrators, which was to be elected and to consist of from one to three persons. The arbitrators were bound to observe the economy of the society, and give orders and instructions, to investigate accounts and plans which may have been made by the directors and their agents. All transactions, exceeding in amount fifty dollars, to be valid, required the sanction of the board of arbitration. This board had also the power to excommunicate arbitrary and refractory members, and to deprive them of all future enjoyments of the society.

New members were to be admitted, being of full age, having been approved of by the directors and board of arbitration, by a vote of two-thirds of the society; and on condition that they should resign all their property to the society, as had been done by the original members. Directors and arbitrators were to be elected as often as shall be deemed necessary by the society. "The highest power shall be and remain forever in the hands and disposition of the society, who reserves the right at pleasure to remove and to establish officers, or to place others in their stead; in short, to make any alteration which may be deemed best." "The cashier was bound to keep all the funds of the association, and to apply all moneys which may come to his hands, by the orders of the directors and arbitrators to the benefit of the society—to pay its debts and to liquidate its general wants."

And it is agreed that individual demands by backsliding members, or such as have been excommunicated, whether such demands may be for goods, or other effects, or for ser-

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vices rendered to the society, are abolished and abrogated by the members for themselves and their posterity. These articles are declared to be confirmatory of those of 1819, and extending to a more detailed explanation. The name of Goesele, the complainants' ancestor, was also subscribed to the above articles, with the other members, generally, of the society.

On the 6th of February, 1832, an act of the legislature of Ohio was passed, incorporating Joseph M. Bimeler and others, by the name of "The Society of Separatists of Zoar," with perpetual succession, with power to hold property, purchase and sell, pass by-laws, etc. And afterwards, on the 21st of February, 1846, an amendatory act was passed, modifying a restriction on the income of the society from one to ten thousand dollars. In pursuance of the power given, a constitution was adopted by the society, and other acts conformably to the law were done under it.

There is satisfactory proof that the complainants are the heirs at law of John Goesele, as represented in their bill, who came to this country as a member of the Separatist society, and who continued a member until his death in 1827. It also is shown that the lands purchased were paid for with the proceeds of the labor of the society; consequently, all who contributed, by their labor, to these payments, have an interest in the lands, unless such interest has been relinquished or abandoned. If such right remain and descended to the complainants, the court would presume that the individual claims of the members were equal, unless the contrary were clearly shown.

There was some evidence that Goesele, in Germany, was considered a man of wealth; and that his real estate was worth a large sum. Some of the witnesses state that his property was sold, and from which an inference is drawn that Bimeler received the money. But no facts are proved which authorize this conclusion. On the contrary, it appears that

the only money paid for the lands shortly after their arrival at Zoar, was a pittance which some of them had saved of the eighteen dollars which they had each received, as a charity, in Philadelphia.

The legal questions in this case principally arise out of the articles of 1819 and of 1824. The latter articles include, substantially, those of the former, with some additional provisions and a more detailed regulation, in regard to the general government of the society. The right set up in the defense must rest on those articles, as the act of incorporation was not passed until several years after the death of Goesele.

Against the validity of the defense, two grounds are assumed by the complainants' counsel. First, it is objected that there is no grantee; and, secondly, that if there were a grantee, the grant would be void as a perpetuity.

That the lands were purchased by Bimeler for the society, were paid for by it, and are now held in trust by him, is not controverted. The fee is in him, and the members of the society are the cestui que trusts.

It must be admitted that an unincorporated community cannot, in its aggregate capacity, take lands in grant; nor can its directors and their successors in office take them, as the law, under such circumstances, recognizes no succession. A valid grant to such a community, can only be made to the individuals composing it, or to an individual and his heirs, in trust for its use.

The articles of association constitute a declaration of trust, which Bimeler, the trustee, recognizes as binding upon him, though he did not sign either of the articles. This declaration did not require the formalities of a grant; it was in writing, and the application of the trust being distinctly stated, it was not affected by the statute of frauds and perjuries. The members of the society agree with each other that their property of every description should be held and used as a com-

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mon fund for their general benefit, and they appointed certain agents to manage their concerns and provide for their support. It is true, they relinquished to the society their entire property, but this was done, that, as a community, they might enjoy the benefits of the whole. The agencies which they established relieved the members generally from personal care, but the sum of their enjoyment was not lessened.

The want of capacity in the society, as such, to take by grant, does not invalidate this procedure. The agreement was that the equitable individual right to the trust should be relinquished for a common right with the other members, to the entire property. In effect, it was constituting a universal partnership, known to the common law, and which is not in violation of any of its principles. The members of the society, in their own language, "unite and bind themselves by and through this common and social contract, under the name and title of the 'Separatist Society of Zoar,' and they agree and bind themselves, and promise each to the other, and all together, that they will strictly hold to, observe, and support all the following rules and regulations,' etc. The name of the society was used as a designation of the whole body, the same as the assumed name of a firm to designate its partners. Individuality of ownership of the property then possessed by the members of the association was abolished, and also future acquisitions, for the common right of an interest in the whole. This common right was limited to the members of the association; consequently those who left it, or were expelled, forfeited such right. This was a condition voluntarily adopted in the articles of association, and there is no evidence showing unfairness, deception, or fraud in the agreement. And the members emphatically declare, that "the officers shall be elected and established by a majority of the votes; consequently, the highest power shall be and remain forever in the hands and disposition of the society, who does hereby reserve the right, at pleasure, to re-

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move and to establish officers, or to place others in their stead ; in short, to make any alteration which may be deemed best."

It would be a novel condition in a grant, that the grantor should exercise a discretionary power over the thing granted, and enjoy all the benefits resulting from it. But, it would not be more novel, than that one or more individuals should make a grant to themselves. And if this be a grant, what other character can be given to it? The relinquishment of individual right, present and future, was to the society—in others words, to themselves—a giving up and surrendering an individual interest in a part of the property, for a common interest in the whole of it. By this arrangement, the members of the association were placed on an equality, as to their interests in the property, and their enjoyment of it. Their minutest wants were alike provided for, through the agencies established ; and this was the consideration on which the contract was founded. That, in the absence of all fraud and unfairness, this was a bona fide and legal contract, cannot be doubted. An important part of this contract was, that the property thus surrendered should belong only to the members of the association ; consequently the heirs of the members could not claim an interest in the property as heirs, but only as members. Against such a disposition of property, I know of no principle of law or morals. Any individual has the power to divest himself of his property, real and personal, for a valuable consideration.

But it is said if the articles be considered a contract, a court of chancery would not decree a specific execution of it. And reference is made to the personal services to be rendered by the members, and the guardianship of their children in a state of minority. And it is also contended that a court of chancery will never decree a forfeiture.

The form in which the question is put is no test of the principle. Admit that a contract for personal services will

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not be specifically decreed, as there is an adequate remedy at law ; yet it does not follow that an individual who has performed labor, under a bona fide contract for a fixed compensation, may invoke the aid of a court of chancery to pay him again for the same services. And this, too, without any allegation or proof of fraud in the contract. Chancery may not technically decree a forfeiture, but no court of chancery will give relief to an individual, against his own contract, entered into in good faith, without mistake, and for a valuable consideration. It will give relief against a mere penalty, but not against a sum named as stipulated damages. Goesele and the other members, when they relinquished their individual property for a common interest in the whole, and appointed agents to manage the concern, expressly agreed to receive as a consideration for their property and labor, a support for themselves and their families, including clothing and every other provision necessary for their comfort. The acquisitions would necessarily increase their comforts, by enlarging their means of subsistence ; but the property was only to be enjoyed while they continued members. This was the substance of the contract, fairly entered into and ratified under the most solemn sanctions, after five years' experience. There was no grantor or assignee, and none was necessary. It was a partnership agreement among themselves, and was binding upon each individual who entered into it.

If there be no principle of law opposed to such a community of property, it must be held valid, on the rules which apply to partnerships. There are no moral considerations opposed to it. In adopting it, the Separatist society followed the example found in the early history of the Apostles, and which received an awful sanction of heaven.

But it is said, that this association contemplates an enjoyment of the property in perpetuity, that those who shall be-

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come members of it, through all time, shall enjoy it, and that this the law will not permit.

The common law is said to abhor perpetuities. The strong national feeling in England against the entailment of estates, as being inconsistent with the free enjoyment of property, influenced the courts to establish the rule that no conveyance should be valid, by executory devise or otherwise, which did not vest in twenty-one years after the termination of lives then in being. And this is an established principle of the common law, modified so as to extend to the fraction of a year beyond twenty-one, to embrace the case of a posthumous child.

The title is vested in Bimeler and his heirs without limitation upon its face ; but the use is in the members of the society, present and future, so long as they shall remain members ; with power in the directors generally, to sell or purchase property, for the use of the society ; and this regulation, if not changed, may be perpetual. The persons through all time, who shall become members of the society, are to participate in the trust, and this is supposed to violate the above rule of law against perpetuities.

It must be observed that the title vested in the trustee from the date of the deed ; and the common use, in the society, as fully when the articles were agreed to, as was contemplated at any future period. It is true, that the association could only be perpetuated by the admission of new members. But such admission is not obligatory on the society. An applicant to become a member must first apply to the directors, who bring his case before the board of arbitration, and if he pass their examination, he can only be admitted by a vote of two-thirds of the society. If admitted, it must be on the condition that he shall relinquish his individual property to the members of the association, and with them enjoy a common benefit in the whole. This is matter of contract at the time, as it was at the formation of the society. The perpe-

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tuity then, is not created by the first contract, but depends upon subsequent contracts, which may or may not be entered into. No right is derived or can be claimed under the articles of association, until the individual shall have complied with the conditions of his admission. He then becomes a partner in the association, and is subjected to the original articles, not from any intrinsic force in them, but because he has adopted them by contract. Here is the origin of his right, and of his obligation, and the question may well be asked, Is this a perpetuity? If it be a perpetuity, it is a perpetuity that can extend beyond lives in being, only by voluntary contracts. And where are the fetters of such a perpetuity?

But the most decisive objection against this assumed perpetuity is, that the cestui que trusts, in agreeing that their interest in the entire property should be common, reserved to themselves the right "to make any alteration" in the articles of association, "which may be deemed best." Can a perpetuity be subject to the exercise of such a power? A perpetuity must appear upon the face of a grant or will. It may depend upon a contingency, as the birth of a child, after the limitation allowed; but there can be no uncertainty, as to the event on which the right is to attach. And this is made certain by the instrument which creates the estate.

This association, in principle, does not differ from any other partnership, where the members create the capital by giving up their property to the concern, living upon their profits, applying their surplus to an increase of capital, and receiving new members on the terms of the original association. This, if carried out, may endure for many generations, but it is not a perpetuity, which the law prohibits. The enjoyment of the right, on condition of continued membership, has no necessary connection with a perpetuity. If the condition be broken by a member, it depends upon the

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individuals and the society whether he shall be restored or not.

There is no line of succession marked out by this association, no postponement beyond the time limited by law, when the right shall vest, no family aggrandizement contemplated, no fetters imposed upon the enjoyment of the common property, except the consent of the society, and that the applicant shall come in on equal terms with other members.

The society is peculiar in its organization. Its members seem to have been influenced by a high sense of religious duty—and they evince a determination to reach “a better inheritance.”

The attempt made to impeach the character of Bimeler, by taking the title to the real estate in his own name, and in the management of the general concerns of the society, is not, in my judgment, sustained by the evidence; much less is the imputation against him of immoral conduct sustained. No one acquainted with the imperfections of our nature could expect, from an association like that of Zoar, for any great length of time, an entirely harmonious action. Dissatisfactions under such a system will more or less arise from the contributions of labor required, or the distribution of the fruits of such labor. The jealousy of the human heart often finds sources of discontent in the ordinary intercourse of life. Words are misconstrued, a look or an act is misunderstood, and many other things are considered as evidence of neglect or intentional offense, when the person charged is entirely innocent of the motive attributed to him. And not unfrequently are such sentiments cherished by persons who are influenced by the base or unworthy motives which they attribute to others. This is generally the conduct of narrow minds, and it may sometimes be found in persons of more enlarged capacity. There is nothing in the evidence, conducing to impeach the conduct of Bimeler, that may not be accounted for on the above principles.

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Upon a deliberate consideration of this case, I am brought to the conclusion, that the complainants are not entitled to relief against the contract of their ancestor, entered into bona fide and for a valuable consideration. For the reasons stated, I think the agreement entered into by the members, giving up their individual interest in the property for a common interest in the whole of it, so long as they shall remain members, is not void in law ; and consequently the bill of the complainants must be dismissed.

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The right to construct a patented machine is distinct from the right to use it.

The right to use necessarily implies the right to repair, and also a right to purchase a machine, when the one in use is destroyed, or too much worn for use.

A patentee may reserve to himself the right to prosecute for piracies, within a district where the right of use is conveyed ; but, if he shall afterwards clearly divest himself of that right, by conveying all his interest in the patent, within the particular district, the person who owns the right within the district may prosecute for piracies.

It would be unreasonable, under such circumstances, to call upon the patentee to prosecute.

If, in the various transfers made, it may be doubtful whether an action at law can be maintained, it affords a ground for the exercise of a chancery jurisdiction.

Mr. *Coffin* for complainants.

Mr. *Norton* for defendants.

OPINION OF THE COURT.

This is an application for an injunction. On the 21st April, 1846, Wilson, the assignee of Woodworth's patent for a planing machine, entered into a contract with Bicknell & Jenkins, and on certain conditions expressed, conveyed to

them the "exclusive right to make, use, and vend to others to construct and use, during the full term of said letters patent, from this day until the 27th day of December, 1856, machines for planing, tongueing, and grooving boards, upon the principle, plan, and description of the said renewed patent and amended specifications, within the territory of Hamilton county, in the State of Ohio, and so much of the adjacent territory in the State of Kentucky, as lies along and adjoining said Hamilton county, and within five miles of the Ohio river," subject to the following restrictions: First. Hudson and Hughes had purchased a right of Wilson to make and vend to others one machine only, within the city of Cincinnati. Second. That he had executed several licenses to persons to use machines within the county of Hamilton, on condition that the licensees shall pay fifty cents per one thousand feet, to be renewed in a certain event, securing one dollar and twenty-five cents for every thousand feet of lumber passing through the machine, &c.; and the said Wilson retains the right to license other machines within the territory, so that the aggregate machines within the territory do not exceed thirteen. Third. That the said Bicknell & Jenkins shall not erect for use, use or directly or indirectly authorize to be used within the said territory any machines until the number is or shall be reduced to eight; and when any right of any person to use any of the said thirteen machines shall cease, Bicknell & Jenkins shall not put in operation a machine or machines in lieu thereof until the whole number of machines in operation in said territory shall be reduced below eight; and when so reduced, the number of machines shall be kept at eight."

Sixthly. Wilson agrees, on due notice, to institute and prosecute all actions necessary to secure the monopoly granted by the said patent, within the said territory, at his own expense: and expressly reserves to himself all damages which may occur within said territory; and also an exclu-

sive right to prosecute for piracies therein, and if the business shall be so interfered with by piracies as to affect seriously the benefit of the business, then a reasonable deduction from the amount to be paid shall be deducted on that account and allowed to the proper parties."

These are the only conditions necessary to be considered, in deciding the present application.

Under this contract, Bicknell & Jenkins have a right to make for use, within the district specified, the planing machine, under the restrictions named; and they have also a right to all the receipts under the thirteen licenses granted, they paying to Wilson the sum stipulated.

The right to make a machine is distinct from that of using it; and these rights have been treated as distinct by the parties to the contract. This is clear from the words of the contract, and especially from that part of it which reserves the right to Hudson and Hughes to make a machine, which had been granted to them by Wilson.

Bicknell & Jenkins were bound not to make machines for use in the territory designated, until the whole number was reduced to eight; and when so reduced, the number was not to be increased. But how were they to be reduced? The contract declares that "when any right of any person to use any of the thirteen machines shall cease, Bicknell & Jenkins shall not put in operation a machine or machines in lieu thereof, until the whole number shall be reduced to eight." Now the right to use such machines could only cease in one of two ways. First, by a voluntary abandonment; or, secondly, by a refusal to render an account of the work done, and a failure to pay over the compensation or rents as they became due. There is no statement in the bill that either of these contingencies has occurred, in regard to any of the thirteen licenses. It is clear, then, the right to make for use within the district is vested in Bicknell & Jenkins, with the

exception only in behalf of Hudson and Hughes who have the right to construct one machine.

Many, if not all of the thirteen machines might become useless, and who has the power to replace them? It may be admitted that a licensee may repair his machine, but he cannot construct one. He may have a right to purchase one, for the right of use necessarily implies the right of purchase; but the right to construct, as before remarked, is distinct from the right of use.

The complainants allege that Hinkle, one of the defendants, claims to have a license from Wilson, by which he asserts a right to make said machines within the territory described, and that the other defendants protect themselves under the same license. And the complainants aver that the license of Hinkle is subservient to their contract, and is, consequently, subject to their right. That the defendants have no right under the license to construct a planing machine, and are limited to the right to use such machine. And an injunction is prayed.

The license of Hinkle is dated some days after the date of the contract between the complainants and Wilson. The latter having conveyed to the complainants the right to construct machines for use in the district specified, he could convey no right subsequently to Hinkle to do the same thing. In the contract there was no reservation in behalf of Hinkle, as in the case of Hudson and Hughes; although their right to build a machine was prior to the contract.

An objection is made that the complainants have no right to maintain a suit against the defendants for piracy, Wilson having reserved in the contract an exclusive right to prosecute for piracies, on notice, &c.

On the 2d of July, 1849, Wilson, for a valuable consideration, "assigned to Elisha Bloomer, all his right, title, and interest, in said patent, within the district described." Prior to this, Bicknell had assigned to Bloomer one half of his con-

tract made with Wilson, in conjunction with Jenkins. But afterwards, on the 1st September, 1849, Bloomer assigns to Bicknell, in consideration of the sum of three thousand dollars, "all his remaining exclusive right to build the Woodworth planing machine, within the territory conveyed to the said Elisha Bloomer by Wilson," &c.

From the above, it appears that Wilson has become divested of all interest in the patent, within the territory described; and that Bicknell, in relation to the contract with Wilson, by himself and Jenkins, has a right to claim his equal share of the benefits arising under that contract. Under such circumstances, it would be useless to give notice to Wilson to bring suit under the contract. He has now no interest in the matter, and of course should not prosecute. It is not doubted that a patentee or his assignee, in transferring a part of the patent, may reserve the right to prosecute for piracies. He is interested in the entire patent, and any suit for a violation of it may involve the validity of the right claimed. But this question arises under the contracts referred to.

The bill in this case applies for an injunction, on the ground that the defendants have no pretense of right to construct the machine, and consequently that the act complained of violated that part of the patent right which was conveyed to plaintiffs. This is the only ground on which the jurisdiction of this court can be sustained. I have entertained great doubts whether the plaintiffs have not an adequate remedy at law, and if so, relief in chancery should not be given. And I am induced to sustain the jurisdiction principally on the ground that from the assignments and re-assignments, it may be doubtful whether an action at law can be brought so as to obtain relief for the injury complained of. The right, I think, is clearly in the complainant to construct the machines for planing plank, within the district specified, and the right is infringed by either of the lessees making for themselves or others a machine. An injunction is allowed as prayed in the bill.

DRESKILL v. PARISH.

A subpoena runs like all other process, throughout the district, and also a hundred miles from the place of holding court.

A deposition may be taken of a witness who lives more than one hundred miles from the place where the court is held.

A witness who attends voluntarily, is entitled to his fees, from the party at whose instance he attends.

But the losing party cannot be taxed with the fee of the witness unless he be regularly summoned, by the marshal or his deputy.

Mr. Stanbery for plaintiff.

OPINION OF THE COURT.

Mr. Parish, the defendant, moved the court to retax the cost bill on two grounds :

1. Because there was no service of a subpoena on Charles S. Mitchell and Andrew J. Dreskill, who appeared several terms and were examined as witnesses.

2. Because several other witnesses were summoned who lived more than one hundred miles from the place of holding the court.

The court said, the second ground is not sustainable. A witness may be summoned if he live within one hundred miles of the place where the court is held, though his residence may be out of the district in which the court is held. But a subpoena runs throughout the district, without regard to the distance, the same as any other writ. The deposition of a witness may be taken who lives more than one hundred miles from the place of holding the court.

The first ground is sustainable. The compensation to a witness summoned is allowed. If he attend voluntarily or without summons, his fees cannot be charged against the losing party. The attendance of the witness is voluntary if he be not summoned. The indorsement of accepted, as in

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this case, by the witness on the subpoena, which was never placed in the hand of the marshal, is not sufficient. No attachment can issue to compel the attendance of a witness, under such a service.

In the case of the *U. States v. Burr*, 365, the court say, an attachment against a witness for non-attendance, pursuant to a subpoena, must be served by the marshal. And in the case of the *U. States v. Caldwell*, 2 Dall. 333, an attachment was refused against a material witness who had not been regularly summoned.

The 6th sec. of the act of 28th February, 1799, provides that the compensation to a witness summoned shall be, &c. A witness not summoned, of course, can receive no compensation.

The court ordered the allowance made to Mitchell and Dreskill shall be stricken out of the cost bill taxed against the defendant, and that their attendance be charged to the party summoning them.

THE UNITED STATES v. JOHN B. TAYLOR.

Any officer of a steamboat through whose negligence or ignorance, an explosion takes place which is destructive of life, is guilty of manslaughter.

An officer assuming to act as engineer, is presumed to be well acquainted with the duties he assumes to discharge, and ignorance is no excuse.

In such cases the strictest attention, and a perfect knowledge of the business, are necessary to the discharge of the duty.

A steam agency is attended with dangers.

District Attorney of the U. States for Ohio.

OPINION OF THE COURT.

This is an indictment which charges the defendant with negligence, as an engineer on board of the Virginia, a steam-

boat plying between Steubenville in Ohio and Wheeling in Virginia, through which an individual by the name of Rose, and other persons whose names are unknown, were killed by the explosion of the steamboat boiler.

A jury being sworn, Mr. Bowls was called as a witness by the prosecution, who stated, that for twenty years he had been employed on steamboats. He was first cabin-boy, then steward, cook, second mate ; acted as pilot two years. The Virginia was finished the 2d May, 1848. He had charge of the boat on the day of the explosion, the — March, 1849.

The boat started from Steubenville, her downward trip, stopped first at Wellsville, where some passengers were put out, and freight. Then proceeded down the river, next place at Warren, then Wheeling.

On the return trip, stopped at the Gas Works, took in a passenger at the ship yard, a carpenter ; had a flat boat in tow from Wheeling. Stopped at Litton's landing on the Ohio side ; not certain whether the boat was made fast ; some passengers and freight were discharged there ; did not remain more than five minutes. About the time the boat was ready to start, rang the alarm bell for the engineer to ship the engine, that is, to get ready. This the last witness recollects. A dead sound or crash followed, but he was not conscious. After he become conscious he looked for his wife ; found a woman in the water, wounded ; tried to lift her out, but was not able. He saw on the wreck a man and his wife, wounded. Saw the clerk of the boat in the water, from which he was rescued.

The boat remained at the landing five minutes ; no steam was let off. Does not recollect whether the steam was high ; the engine was not worked at the landing. About an hour before the explosion, saw the engineer sitting near the engine. Witness said to him, we are getting up the river faster than usual, but does not recollect what reply was made. The engineer still continued reading.

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Witness does not know that there was a supply of water in the boiler. He thinks there was more weight on the safety valve than usual. The explosion took place about five o'clock in the evening. When the boat lands, the steam should be worked off, or be permitted to escape. The weights on the safety valve were not usually hung there.

William Burke was acquainted with the machinery. Witness built small engines. He has acted as engineer. Made two or three trips on the Virginia. The last trip he made on her was about a month before the explosion. The boilers were said to be new, and they had that appearance. And the engine seemed to be in a good condition. Six weeks or two months before the explosion, witness thought the boilers were number one; bore one hundred and twenty-seven pounds to a square inch. This without the extra weight. Want of water in the boiler produces explosion. It is the business of the engineer to see that there is a sufficiency of water in the boiler.

Mr. Litton stated the explosion took place at his wharf. He was in his warehouse when it took place. Four or five persons were taken out of the river. Three dead bodies were recovered from the river.

Mr. McCully says the cause of the explosion was a want of water in the boiler.

On the part of the defendant, the following witnesses were examined :

Capt. Dormon : Says for the last three years he has been running a boat as captain, between Wheeling and Steubenville. Was a passenger on board the Virginia. He handled the pump as other men. The ice was running—defendant was engineer, and did well. Witness has been steamboating thirty-five years.

Capt. Wosley : Was captain on the boat ; defendant engaged as engineer eighteen months or two years. He considered the defendant a careful man.

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Mr. Fox : Has been an engineer ten years ; has known defendant six years as an engineer, and he considers him a careful man. Some of the pieces of the boiler which witness examined, appeared to have been defective.

In their instructions to the jury, the court said, this prosecution is brought under the 12th section of the act of 7th July, 1838, which provides " that any captain, engineer, pilot, or other person employed on board of any steamboat or vessel propelled in whole or in part by steam, by whose misconduct, or negligence, or inattention to his or their respective duties, the life or lives of any person or persons on board said vessel may be destroyed, shall be deemed guilty of manslaughter, and upon conviction thereof before any Circuit Court in the United States, shall be sentenced to confinement at hard labor for a period not more than ten years."

The numerous disasters which have occurred to steamboats on our lakes and rivers, destructive to the lives of passengers, became so frequent, as to call for legislation by Congress, in whom is vested the commercial power in regard to our commerce with foreign nations, and among the several States. Many of these occurrences were believed to happen through the ignorance or want of attention of the officers on board the vessel. And the above act was passed to punish any misconduct, negligence, or inattention of the officers on board of any steamboat or other boat propelled by steam, through which life was destroyed.

The first thing to be observed in regard to this law is, that every one who assumes to perform certain duties, as captain, pilot, or other responsible duty on board a steamboat, is made responsible for any act done, through ignorance or negligence, without reference to his fitness for such duty. This is proper. Any individual who is incompetent to the discharge of the duties of engineer, is guilty, though the act which destroys life was done through ignorance. It is no mit-

igation of the offense that the engineer erred through a want of knowledge. He should not have engaged in a duty so perilous as that of an engineer, when he was conscious that he was incompetent.

The explosion which took place in the case before us was perhaps, more destructive of life than any other which has occurred, when the small number of passengers on board the Virginia is compared to other explosions. The question you are to try is, Did it occur through the ignorance or carelessness of the engineer! No other person on board the boat is implicated.

From the evidence it appears that there was an unusual pressure of steam, on ascending the river from Wheeling. Weights were hung on the safety valve. This was unusual. One of the witnesses being near the engine, saw the engineer sitting in a chair, reading. He observed to him that the boat was running more rapidly than usual. No reply was made. On the trip up the river, stopped frequently. About one hundred and fifty yards below the place of explosion, the boat rounded to the shore, where it remained about five minutes; the steam was not worked off at that place, nor was it permitted to escape. At Litton's wharf, the boat remained about five minutes; no steam was let off. The boat, on landing, it is said, by one of the witnesses, ran on the ground, which caused her to careen, the side of the boat aground being higher than the other side. This necessarily threw the water in the boilers to the lower side. The fires were continued, no steam escaped, and when the wheel made a few strokes of backwater, which drew the boat from the ground, it assumed a level position, and the explosion instantly took place. Several of the witnesses said the explosion occurred because there was not a sufficient quantity of water in the boilers. When the boilers have their full complement of water, a boiler very rarely, it is supposed, bursts. But when there is a deficiency of water, and the vessel is

careened, the upper side of the boiler must soon become heated to the utmost extent, and when water is suddenly thrown against the red heat of the boiler, as it must be, when the vessel is afloat, there is great danger of an explosion, as the water, in coming in contact with the red heat of the boiler, is immediately converted into gas, and an explosion generally follows.

Now, gentlemen, it is for you to say, whether the engineer was not bound to ascertain the quantity of water in the boilers; and, especially, whether it was not his duty to let off the steam, whenever the boat lands or stops, and especially, when the steam is high. If, in this respect, or in any other, the engineer was guilty of negligence, your verdict will be, guilty. It is true, the punishment of engineer, if guilty, will not restore the dead, or mitigate the sufferings of the wounded. But the example will be salutary to prevent like occurrences in future. This is one of the great objects of punishment.

I am disposed to think that very few persons consider the dangers of steamboat travelling. Every passenger sleeps and treads upon a fiery volcano, governed by the fixed laws of the most dangerous and powerful agent in nature. And if he, under whose superintendence this fiery agent shall be placed, is ignorant of its laws, or does not strictly attend to them, an explosion is certain, and a destruction of life more than probable. Custom often familiarises us with dangers, until they are but little regarded. But when the agent is charged and restrained beyond the point of endurance, its bonds are broken, and destruction follows.

It is your province, gentlemen of the jury, to weigh the evidence, and decide on the probabilities of guilt. Guilt in such cases as this, is seldom susceptible of clear demonstration. We have to act on the highest degree of moral certainty. If you are satisfied, in such a view, of the guilt of

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the defendant, you will so find ; but if your minds are not led to this result, you will find the defendant not guilty.

After being out a considerable time, the jury returned a verdict of not guilty.

CIRCUIT COURT OF THE UNITED STATES.

INDIANA—MAY TERM, 1851.

EXTRACT FROM THE CHARGE TO THE GRAND JURY OF THE UNITED STATES CIRCUIT COURT.

After advertng to various offenses within the jurisdiction of the Grand Jury, and which it would be called to investigate, the Judge referred to the contemplated invasion of the Island of Cuba as a subject of national concern. He observed, the newspaper rumors, and the proclamation lately issued by the President, authorize, if they do not require, the subject to be brought before the Grand Jury. It seems this nefarious plan is not of recent origin. The late chief Magistrate, as well as the present, not only issued a proclamation, but found it necessary to put in requisition a part of the army and navy, to preserve the peace and honor of the country.

Doubts have been suggested whether the judicial power had been sufficiently active in bringing to punishment these marauders, who, under the pretence of liberating the oppressed, stand ready to engage in a career of plunder and murder. Whatever motives they may avow, this would be the result of their successful action. Such individuals, with

Charge to the Grand Jury of the United States Circuit Court.

the prospect of success, could easily be induced to turn their arms against their own country. They are reckless of consequences. By the laws of nations, they are justly held to be outlaws and pirates.

The act of Congress of the 20th of April, 1818, entitled, "an act for the punishment of certain crimes against the United States," &c., applies to these individuals. The first section provides, "if within the jurisdiction of the United States, any citizen shall accept and exercise a commission to serve a foreign Prince, State, Colony, District, or People, in war, by land or by sea, against any Prince, State, Colony, or People, with whom the United States are at peace, shall, on conviction, be punished," &c.

The 6th sec. provides, "that if any person shall, within the territory or jurisdiction of the United States, begin or set on foot, or provide, or prepare, the means for any military expedition, or enterprise, to be carried on from thence against the territory or dominions of any foreign Prince or State, or of any Colony, District, or People, with whom the United States are at peace, every person so offending, shall be punished," &c.

You will observe, gentlemen of the jury, that if any one "shall begin or set on foot, or prepare the means for such enterprise," he is within the statute. The overt act is not an invasion of the country, but taking the incipient steps in the enterprise. To provide the means for the expedition, as the enlistment of men, the munitions of war, money, in short, any thing and every thing that is necessary to the commencement and prosecution of the enterprise.

In the ages of barbarism, private war was tolerated. Physical power was then the arbiter of right, and a dexterous use of the instruments of death, was the prevailing logic. But this has been long since exploded among civilized nations. The christian system has engrafted on the laws of nations a better logic—a logic addressed to the mind and

conscience, and which conforms more to the principles of humanity.

Every government is responsible for the acts of its citizens. They must be restrained from violating the rights of other nations ; and any government which has not the power or disposition to do this, subjects itself to a declaration of war by the injured party.

Our physical resources, gentlemen, are in a rapid course of development. In this respect our country has surpassed the most ardent anticipation of its friends. But I wish to impress upon your minds, that this is not the most satisfactory evidence of our national prosperity. How have we made this wonderful advance ? Is it not mainly attributable to that great and fundamental law which made us a nation, and to an observance of the laws, State and Federal ? These laws emanate from the people, through their representatives, and bear the impress of their will. A perseverance in this course will lead us on to a still higher and nobler destiny.

But, gentlemen, no free government can be maintained without moral power. If this be broken down, physical power must be substituted in its place. As in France, we may still have a republic in name, but it will be a republic sustained by bayonets. A government of laws, sanctioned and sustained by the people, is the only guaranty for public and private rights. Whenever the law shall be trampled under foot and contemned, with impunity, there is no hope in the future. And may I not ask the question, whether there is not in the general aspect of our affairs enough to excite a deep solicitude on this subject ?

We see associations of lawless individuals in different parts of the Union, in contempt of the law, and the honor and peace of the country, ready to embark in a piratical war against a people, with whose government we are at peace. Other combinations have been formed to subvert the

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government, and others to resist, in an unconstitutional manner, enactments made by the highest authority. These indications are ominous. At an earlier period in the history of our government, an individual of the highest talent, and who had held the second office in the government, was overwhelmed with infamy, and was criminally prosecuted, on the ground that he had set on foot a treasonable conspiracy against the government, by an attempt to divide the Union, and erect an independent western republic. But what do we now see? How painful is the contrast.

Is this state of our affairs a matter of indifference to any one? What must be its effect on foreign nations? Will it not shake their confidence in the permanency of our institutions, and weaken the moral force of our government at home and abroad? Who does not feel proud of the high position occupied by our nation, among the nations of the earth? And who does not desire to increase the glory of his country? This can be done only by a devotion to the constitution and laws of our country—laws enacted by the people, through their representatives; and which may be modified at their will. Every good citizen will throw his influence in this direction. It will discourage all unlawful combinations, and restore to this glorious government that harmony and moral power, which shall distinguish it among other nations. Make this government what, in its formation, it was intended to be, a government of the people, and maintain sacredly the great principles on which it was founded, and its blessings will be perpetual.

Denniston, Fellows et al. v. Coquillard & Emrick.

DENNISTON, FELLOWS ET AL. v. COQUILLARD & EMRICK.

A contract was made for the purchase of certain tracts of land, as a consideration for which six thousand dollars were to be paid, and certain work was to be done.

The money was paid, but the work was not done. A bill being filed under such circumstances, it was dismissed.

There is no principle in chancery better established, that the party who asks a specific performance, must show performance on his part, or that he has offered to perform, and been prevented from doing so, by the acts of the defendant.

Messrs. Smith and Jernagen for complainants.

Messrs. Morrison and Thayer for defendants.

OPINION OF THE COURT.

This is a case in chancery in which the complainants pray the specific execution of the following contract: On the 1st June, 1835, Fellows and Denniston purchased from Coquillard several tracts of land at South Bend, in this State, on the conditions that they will pay Coquillard six thousand dollars at certain times stipulated, with the privilege of paying that sum before it become due. And in the language of the contract, the purchasers "are furthermore to build or construct a sufficient dam across the river St. Joseph, and cut a mill race from said dam to intersect the said river at a point below or at the mouth of the brook, near the ferry at Water street, in the town of South Bend, within one year from and after the time that they shall obtain from the legislature of the State of Indiana, an act for that purpose. And they are to use their exertions to procure of the legislature an act for the purpose of constructing a mill-dam at the next session thereof, if possible. But if any accident should intervene to hinder the progress of said dam, then they are to have twelve months further time to complete the same. If the money should not be paid when due, ten per cent. were

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to be paid. Now, should the said Fellows and Denniston well and truly fulfill the conditions aforesaid, in all things, and pay to the said Coquillard the full amount of the purchase money, then, and in that case, the said Coquillard will execute to them a deed of general warranty for the premises.

At the next session of the legislature the desired act was passed, on condition that a lock for the passage of steamboats and other crafts should be constructed and kept. The money-consideration has all been paid. Arrangements were made for cutting the race, and funds were placed in the hands of Coquillard, who was to superintend the work, as the agent of the purchasers.

A man was employed who cut a part of the race, perhaps one half of it, and to whom Coquillard made advances exceeding the amount of work done, some seven hundred and fifty dollars, and who refused to go on with the work unless an additional advance was made. In consequence of this, Coquillard agreed to extend the time for the completion of the work one year. The progress of events brought the parties to that period in our history, in the West, when a revulsion in prices took place. Coquillard became insolvent. Judgments were obtained against him, and his real property, including the purchase of Fellows and Denniston, were sold by the sheriff.

Christopher W. Emrick, in April, 1845, received a transfer of a judgment against Coquillard, without recourse, from the Bank of Indiana; and he afterwards purchased the lands embraced by the above contract, for two thousand dollars. He had full notice of the purchase by Fellows and Denniston.

The bill is filed against Coquillard & Emrick, and a conveyance of the land is prayed for, under the above contract, when only a part of the consideration, on which the deed was to be made, has been performed. In addition to the

payment in money, of the sum of six thousand dollars, the purchasers were to build a sufficient dam across the river St. Joseph, and cut a mill-race from said dam to intersect the river at Water street, in the town of South Bend. Neither of these works have been completed. A part of the canal has been cut. The dam has not been built. The question arises whether the party who has failed on his part to perform the contract, can ask specific execution of it.

If there be any thing settled, it is, that a party who asks the aid of a court of chancery, must show that he has performed his part of the contract, or has been prevented from performing it, by the act of the party against whom he prays relief.

The question whether time is of the essence of the contract does not arise in this case. The time was extended by Coquillard, one year, but that had expired long before the bill was filed. In fact, the contract seems to have been abandoned by the complainants, before they applied to chancery for relief. And the only principle on which they contend for relief is, that compensation can be made to Coquillard for the injury sustained by him, by reason of a failure by the complainants to build the dam and cut the race.

This is not a case where compensation can be made for the failure to perform. Where a sum of money is to be paid, and there are no changes in the subject matter of the contract, to prevent a specific execution of it, it may be decreed, and interest on the deferred payment is held to be a compensation for the delay. But in the case before us, if, by the nature of the contract, the dam and the race might be completed, after the expiration of the year extension by Coquillard, yet they must be completed before a conveyance of the land could be required. Courts of equity can neither make contracts for parties nor modify them, to suit the convenience and interest of one of the parties.

It would be difficult, if not impracticable, to ascertain what

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damage Coquillard suffered by the non-performance of the complainants. He is shown to be insolvent, and this may have resulted from their failure. To obtain a specific performance, the individual seeking it must show vigilance on his part. He must prove that he has performed his contract, or offered to perform it, and was prevented by the defendant.

The authorities on this point are so numerous and so well known to the profession, that a citation of them would be useless.

The bill is dismissed at the costs of the complainants.

COFFEEN v. BRUNTON.

A party is not entitled to an injunction to protect him against another person who has assumed the same label, as to a medicine or drug claimed to have been invented by the complainant, unless his right is clear.

If they were concerned in getting up the medicine, both contributing to the compound as a partnership action, neither can claim the exclusive right.

In such a case the court will leave the parties to their legal remedies.

Injunction should only be granted where the right is clear, and where, from its nature, a remedy at law would be inadequate.

Messrs. Smith & Yandes for complainant.

Mr. Test for defendant.

OPINION OF THE COURT.

This bill was brought by the complainant to enjoin the defendant from using a label, or any other representation which would mislead the public in purchasing his liniment, for that which is manufactured and sold by the complainant. The charge in the bill is, that the label of the defendant is so assimilated to the plaintiff's as to lead to this imposition

by which the defendant is greatly benefited, and the plaintiff injured. That the complainant, at great expense, has established his business, and that his medicine, called the "Chinese Liniment," is in great demand as an efficacious remedy in many cases of disease and injuries ; and that the defendant is enabled to sell his liniment by assuming the false fact, that it is the same as the plaintiffs.

The defendant, in his defense, sets up, that John Loree, of whom he purchased, is the inventor of the "Chinese Liniment," having furnished the complainant with a recipe for making the same, except two ingredients which were added on their mutual consultation. That the complainant agreed to take the said Loree as a partner into the business, so soon as he could advance capital ; until which time he was constituted the general agent of the complainant to sell the medicine, and was so designated in his hand-bills. But when he had procured the necessary capital, the complainant refused to take him as a partner. That Loree then made his liniment, called the "Ohio Liniment," which contains the same ingredients of which the complainant's liniment is composed, with the addition of two or three others, which make it more valuable.

A great number of depositions were taken on both sides, which show, on the part of the complainant, that in the early part of the year 1846 he went to Cincinnati, and remained there several weeks, to make what he called the "Chinese Liniment." He selected several of the ingredients from the store of Mr. Burdsell, a very respectable druggist, and concocted the liniment, and gave it the name of the "Chinese Liniment," procured vials, had labels and hand-bills printed, and thus prepared the article for sale. Neither Mr. Burdsell nor any other witness has stated of what ingredients this liniment is composed. The witnesses state they do not know of what the compound is made, but all of them agree

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in saying that it is a valuable medicine ; and they give the same character to the liniment of the defendant.

The following letter; written by the complainant, is relied on, as sustaining the answer :

“ BLUE BALL, Aug. 9th, 1845.

“ DR. JOHN :—We had expected to have heard from you before this time. I got home in two weeks after I left your house. I made myself some acquainted with the prospect of selling the liniment we have been talking of. It appears to me the prospect is first rate, if the thing is properly managed. I divided the little I took with me among more than a dozen persons, who say they look with great anxiety for the thing to come out. If I had the receipt, I would take pains to ascertain what would be the cost of preparing it in quantity. Mr. Freeman says he would like, when he goes east, to bring any stock that we may want, which would make it come cheaper than to procure the stock in this country. I feel fully confident that a nice business may be done. The country is as ripe now as ever it was for a thing that is new. If you will send me the receipt, I will go to Cincinnati and ascertain, as near as I can, what will be the whole cost, including the necessary handbills, to accompany the article ; and also the expense of the vials ; they ought to be done up in the neatest manner. It seems to me that they would look well of a square form, about four inches long, and holding three oz. By going to the glass factory any form can be obtained. When you send the receipt write out the names of the articles very plain, so as to avoid any mistake ; as the whole list will not be shown to any apothecary. I think we ought to have always a supply of the article on hand. I have no doubt if I had a supply when I went to Kentucky, I could have sold twenty or thirty dollars worth.”

This letter was dated in August, 1845, and it appears, from the evidence, that the recipe was forwarded to the complain-

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ant by one of his daughters, in August, 1845, some months before he went to Cincinnati to prepare the medicine. And in regard to a small amount of the medicine referred to in the above letter, it is in proof that in June, 1845, Loree brought to the house of the complainant, a jug full, as he said, of the ingredients of which the liniment was made ; and the daughter of the complainant assisted him in making the liniment. A part of this, probably, was taken by him to Kentucky.

On the 28th of February, 1846, the complainant writes to the defendant from Cincinnati, that " every thing seems to be going as favorably as we can desire. There is one universal burst of praise in favor of the liniment," &c. " I have, as favorable and flattering expressions from gentlemen of the highest respectability as I could desire, and shall append them to the bills I am now getting printed, of which I will send you some as soon as they are done," &c. " Our great object must be to move the thing, and give it notoriety. One hundred thousand bottles, I have no doubt, could be sold in the United States, if they were only in the market, in a year."

From these letters and other evidence in the case, it satisfactorily appears, that the defendant was engaged with the complainant in making this medicine. The recipe spoken of by Loree, obtained from a doctor Diffendaffer, with whom it is alleged he studied medicine, named many of the materials out of which, in all probability, the compound was made. Two or three other ingredients, the defendant admits, were added to those named in the recipe ; and, it is probable, though there is no positive evidence on the subject, that the complainant, at Cincinnati, when compounding the ingredients, may have added some others. And that this is the ground on which he declares the defendant is ignorant of the ingredients which compose the " Chinese Liniment." However this may be, I cannot doubt that the defendant was at first actually concerned in getting up and bringing out the

medicine, and that a partnership between the parties was contemplated.

Some time after the defendant had commenced his general agency in selling the medicine, the parties quarrelled, and afterwards had a compromise, in which, from some of the witnesses, the defendant seems to have relinquished his interest. But that compromise does not appear to have been carried out, and the defendant asserted his right, and prepared the "Ohio Liniment," and through his agents, handbills, &c., distributed it through the country.

These facts are referred to, to show, that in a case like the present, where rights are contested between the parties, chancery will not interfere and enjoin a party from using labels, or marks, to recommend his article, though it may, to some extent, be substituted for that of the plaintiff's. The matter, of right, must first be determined by an action at law or otherwise, and this is not the object of the present bill. Both medicines are highly recommended by those who have used them, and several of the witnesses think they are composed of the same ingredients. If the "Ohio Liniment" is the same as that of the plaintiff's, he having no exclusive right to it, is not injured by the representations of the defendant.

To entitle a complainant to protection against a false representation, it is not essential that the article should be inferior in quality, or that the individual should fraudulently represent it, so as to impose upon the public; but, if by representation, it be so assimilated, as to be taken in the market for an established manufacture, or compound of another, the injured person is entitled to an injunction. The injury is not the less, though the false representations be made without a knowledge of such interference. False marks or brands are generally fraudulently assumed. As where, in the manufacture of cotton cloth, a mark is assumed intentionally, of a manufacture whose products stand high in the

market, it will be considered as fraudulent. No one can interfere with another's business, injuriously, for his own benefit, with impunity. This is an important commercial principle, of extensive application. And, as in such cases, the damages cannot be ascertained at law, relief will be given by injunction.

But where, as in the present instance, there is a controversy between the parties, whether both were not concerned in the establishment of the business, it is not a case for an injunction. The bill is not framed with the view of adjusting such a controversy. The right of the plaintiff who claims protection in this form, must be clear. If it be controverted, chancery will leave the parties to their remedy at law; or at least, to such a proceeding as shall present the whole merits of the controversy, and enable the court to decide it.

I concur in the opinion of my brother judge, that the application for a rehearing must be overruled.

CIRCUIT COURT OF THE UNITED STATES.

MICHIGAN—JUNE TERM, 1851.

LEWIS BENEDICT v. MAYNARD & MORGAN.

The plaintiff indorsed two post notes of the Bank of Washtenaw, Michigan, for fifteen thousand dollars, which notes were discounted by the Mechanics' and Farmers' Bank of Albany, and by that bank the funds of the notes were paid to the creditors of the Washtenaw Bank to the amount of \$2445 61.

At the time of the indorsement, Benedict took to the Washtenaw Bank certain securities, which were sold at auction, and bought by Benedict for \$19,250. The Washtenaw Bank failed, and James Kingsley, receiver of said bank, agreed to collect the securities, rendering a strict account, and paying over to Benedict the amount received, until the Mechanics' and Farmers' Bank was paid, including interest, costs, and expenses, and the remainder of the securities to be paid to the creditors of the Washtenaw Bank.

A part of the securities were retained by Benedict.

The defendants became the security of Kingsley, that they should faithfully perform, &c.

Action was brought by the plaintiff against defendants, on the covenant.

Defendants demurred because the plaintiff did not set forth in his declaration in what manner he used diligence to collect the New York securities.

This held not to be necessary. The averments in the declaration held to be sufficient.

The duties of receiver of the Washtenaw Bank, and agent, not inconsistent.

The securities being sold to the plaintiff, were subject to the contract, and not to his acts as receiver.

Lewis Benedict v. Maynard & Morgan.

Barstow & Lockwood for plaintiff.

Emmons & Vandyke for defendants.

OPINION OF THE COURT.

This is an action of covenant founded upon an instrument under seal, dated the 4th of July, 1850. Among other things the covenant recites that about the 1st of October, 1838, the plaintiff indorsed two post notes of the Bank of Washtenaw, then doing business in Washtenaw county, Michigan, for fifteen thousand dollars each, dated the 1st of October, 1838, and payable in six and nine months from date ; and which were discounted by the " Mechanics' and Farmers' Bank, of Albany," on which the bank paid the drafts and checks of the Washtenaw Bank, to the amount of twenty-four thousand forty-five dollars and ninety-one cents, which notes were protested when due for non-payment. At the time of this indorsement, Benedict took from the Washtenaw Bank certain securities, which were sold at auction in 1839, with the consent of the bank, and bought by Benedict for nineteen thousand two hundred and fifty dollars.

The Washtenaw Bank failed, and James Kingsley, receiver of said bank, some time subsequently, made a proposition to Benedict to receive said securities, to collect the same, rendering a strict account, and to pay over to Benedict the amount received until the Mechanics' and Farmers' Bank should be paid, with all interest and expenses, counsel fees, costs, and a reasonable commission incurred by the said Benedict, and the remainder of said securities to be paid to the creditors of the Washtenaw Bank. A part of the New York securities were retained by Benedict, who was to account for the same. And the defendants bound themselves that Kingsley should faithfully execute the trust.

In consideration of the above, Benedict agreed to place all the securities, except those in New York, &c., into the

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hands of Kingsley, who was to collect and account for the same, &c. And the President and Directors, and others interested in the stock of the Bank of Washtenaw sanctioned the arrangement.

The securities amounted, nominally, to one hundred and thirty thousand dollars ; the debt to Benedict exceeded twenty thousand dollars.

The defendants demurred to the declaration, and assigned for causes of demurrer :

1. That the plaintiff has not set forth in his declaration in what manner he used reasonable diligence to collect the said securities, &c.

2. That he has not in the 3d and 4th counts of the declaration shown any diligence used by him to collect them.

3. That the plaintiff has not averred performance of any thing on his part to be performed, or shown what expense he has incurred, &c.

The main ground of the argument on the demurrer was, that the contract was illegal and void at law, as Kingsley, the receiver was a statutory agent, and was bound strictly by the law in the performance of his duties. That he was bound to collect or sell the assets of the bank, and account to its creditors. That he had no authority to pay commissions to Benedict, or costs. That the receiver had no power to give him a preference over the other creditors of the bank.

The duties of the receiver are specially pointed out in the statute, and, among others, " he is authorized to redeem all mortgages and conditional contracts, and all pledges of personal property, or to sell such property subject to such mortgages, contract, or pledges."

That the receiver is bound by the authority under which he acts, is admitted. He cannot substitute his own discretion, where the law has enjoined upon him a positive duty. But the powers exercised under this contract were derived

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from the contract, and not specially from the statute. Benedict held these securities as his indemnity, and both in law and equity he was authorized to hold them, until the debt he had paid, or was reponsible for, was discharged. He was connected with the "Mechanics' and Farmers' Bank," of Albany, which paid the drafts of the Washtenaw Bank. This gave credit to the new bank, and, perhaps, enabled it to commence operations. He was personally responsible for these allowances, as indorser, and he, at the same time, received the transfer of the securities. It is not probable that the receiver had the means of redeeming these securities, or any part of them, by the assets of the bank which at first came into his hands. And he could not claim any part of them, in the hands of Benedict, until his demand was paid. He could compel Benedict to use proper diligence in collecting the moneys, but he could not claim possession of the notes, bonds, &c., or money before full payment to him.

Under these circumstances, Benedict agrees to authorize Kingsley, as his agent, to make the collection, and pay over to him, as by the contract was stipulated. There is nothing illegal in this arrangement. Kingsley was not acting as receiver in this matter, in collecting the assets of the bank to be distributed among its creditors. Until the money was paid to Benedict, the receiver could not claim anything of him as assets of the bank. After the pledge was redeemed, all the surplus became assets of the bank, and Kingsley was bound to deal with them as such.

This arrangement was manifestly for the interest of the creditors of the bank, the president, directors, and stockholders desired it, and the person appointed to make the collection was the legal agent, for the collection of the assets of the bank. It was his duty to wind up the concerns of the institution, in as short a time, and in as economical a manner, as could be done. This, the interest of the creditors of the bank required, and was specially enjoined by the law. Bene-

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dict did not stand as a creditor merely; he was a creditor, but he held in his hands, perhaps, almost all the assets of the bank, honestly pledged for his indemnity. His claim was equitable and just, and might well receive, as it did receive, the sanction of a court of chancery.

It is objected that the receiver had no power to allow the commissions to Benedict, or to pay costs. No court could refuse to allow these. It was a charge for labor and expense in the business of the bank. Benedict did not receive the notes, bonds, or stock, at the amount called for upon their face. Many of them were no doubt worthless. This may be presumed from the amount of securities he received, which exceeded his responsibilities for the bank, some five or six hundred per cent. He could only claim the amount that should indemnify him, and that he was entitled to. From the nature of the business, he could not avoid costs, and he was entitled to a reasonable compensation for his labor. This necessarily arose out of the nature of his securities, and the obligations of the Washtenaw Bank. And it was proper and legal, in the covenant under consideration, to provide for their payments.

The purchase of these securities by Benedict, he being the trustee, and the sale being made by him, on ordinary principles, would not be valid, unless sanctioned by the cestui que trusts. But this purchase was not insisted on. From the first to the last of this transaction, Benedict seems to have acted in good faith, and with the view to promote the interest of the stockholders of the bank.

This covenant is dated 4th of July, 1840. Benedict's indorsements were made 1st October, 1838; one of the notes was payable in six months, the other in nine; so that after the last note was protested, less than two years transpired before the securities were placed in the hands of Kingsley. Those securities consisted in mortgages on real estate, stocks of various kinds, and others evidences of indebtment. We

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think that the averments in the declaration of the performance of his covenants by the plaintiff is sufficient. Upon the whole, the demurrer to the declaration is overruled.

ELIJAH STANTON v. JAMES SEYMOUR ET AL.

An action for false imprisonment is trespass.

And this is the case whether the imprisonment be charged under color of process or without.

In this action, matters of aggravation may be proved without being stated in the declaration.

A plea must be single.

It must rest the defense on a single point.

Barstow & Lockwood for plaintiff.

Davidson & Hollbrook for defendants.

OPINION OF THE COURT.

This action is brought against the defendants for false imprisonment. The declaration contains four counts. To the three first counts the defendants pleaded the general issue, not guilty.

All the defendants, except Hopkins, pleaded specially as to the first three counts, and by separate special pleas sets up substantially the same defense, set up by the others. They state in their special plea, "That a warrant was regularly sued out by the defendant, James Seymour, against the plaintiff, that it was delivered to the plaintiff, and that he voluntarily gave bail without any arrest or imprisonment.

To the fourth count all the defendants demurred.

The plaintiff demurs to the special pleas, and joined in demurrer to the fourth count.

In support of the demurrer to the fourth count it is contended that, from the facts set forth in the declaration, the

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action should have been case, and not trespass. That the party, if at all arrested by the warrant, could not charge the defendants with force. That they are not liable to trespass while the warrant remains unsuperseded. 2 New Hamp. Rep. 491 ; 9 Bal. Abr. 463 ; 3 Hen. & Mumford 265 ; 5 Wend. Rep. 170-2.

The 4th count in trespass is good. It is in the proper form in an action for false imprisonment. 2 Leigh's Nisi Prius 1431, 1437. The complaint is, for injuries done under color of legal process. This is an elementary principle, and can require no citation of authority to sustain it.

In the fourth count matter is set up in aggravation ; this was unnecessary, as it might have been proved without an averment of it in the declaration. The form is different from that of an action for a malicious prosecution.

The special pleas set up legal process as a justification for the imprisonment charged, and then aver, that the defendants did not arrest the plaintiff, but that he voluntarily gave bail. Here are two defenses. Justification by legal process is one ; that the defendants did not arrest and imprison is another. The allegation of bail having been given by the plaintiff voluntarily, is immaterial. It is argumentative, by denying the false imprisonment which had been before denied. The plea is double. Issue could not be taken on one allegation without admitting the other. A plea in bar should confess and avoid, or else traverse the declaration. There is some uncertainty in regard to these pleas. A plea is bad, that embraces a traverse with a confession or avoidance.

The demurrer to the fourth count is overruled, and the demurrers to the special pleas are sustained.

RAYMOND, LIBELLANT v. THE SCHOONER ELLEN STEWART.

The giving of a note to a material man does not extinguish the general maritime lien, for materials furnished in building a vessel, or in repairing it.

The rule holds where the lien is given by statute.

The general maritime lien does not apply on domestic vessels.

It is important that the note given should be delivered up at the trial.

This is essential to the maintenance of the action.

The rule as to the maritime jurisdiction over our navigable waters is the reasonable rule.

It is within the reason of the principle of jurisdiction at first adopted.

Mr. *Walker* appeared for libellant.

Mr. *Abbott* for defendant.

OPINION OF THE COURT.

This is an appeal from the District Court. And the only question is, whether a material man loses his lien on a vessel by taking a promissory note on time, which he offers to deliver up at the hearing. The case in the District Court was decided against the libellant.

In the revised code of Michigan of 1848, p. 537, sec. 1, it is provided, "that every ship, boat, or vessel, used in navigating the waters of this State, shall be subject to a lien thereon: 1st. For all debts contracted by the master, owner, or agent, or consignee thereof, on account of supplies furnished for the use of such ship, boat or vessel, on account of work done or materials furnished by mechanics, tradesmen, or others, in or about the building, repairing, fitting, furnishing, or equipping such ship, boat, or vessel."

By the civil law, those who built, repaired, or supplied a ship, had a lien on the vessel for his compensation. And this principle was incorporated into all the codes of maritime law. It was acted upon in England until the time of Charles II., when, through the action of the courts of common law,

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which only recognized the common law lien of a mechanic, which resulted from the labor performed, and the possession of the thing.

This maritime lien is extended by the civil and general maritime law, to all ships and vessels, whether domestic or foreign. But in the case of the General Smith, and in a number of subsequent cases, the Supreme Court of the United States have held, that unless the law of the State give a lien, there can be none, on domestic vessels, or vessels engaged in our internal commerce. But they have held that where a lien is created by the local law, it will be enforced by a maritime court.

The late act of Congress extending the principles of the maritime law, somewhat modified, to our northern lakes, and the rivers falling into them, removes all difficulty as to the exercise of such a jurisdiction. The maritime jurisdiction, as administered in England, was limited to the waters within which the tide ebbed and flowed. But by the civil law there was no such limitation. It was applied over all navigable waters.

It is contended that the taking of a promissory note, is a waiver of the lien.

In ordinary cases, a promissory note is not evidence of a payment, so as to bar an action, for the consideration, unless it was so received at the time it was delivered. Where it is not so received, the holder may bring his action on the original consideration, and deliver up the note at the trial. 7 John. Rep. 310; 1 Cowen 290; 1 Doug. 510. The delivery of the note is essential to the maintenance of the action, especially if it be negotiable.

A case in 12 Wheat. 611, is referred to as decisive of this point. But there was no offer in that case to deliver up the note, and it did not appear from anything in the case, that it might not have been negotiable, and was then in the hands

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of a bona fide holder. The decision turned upon this consideration, against the enforcement of the lien. In the case under consideration, the note is presented to the court, to be surrendered to the party giving it.

By the common law, if a credit be given, and a new security taken, it discharges the lien. 4 Wash. 456 ; 4 Comp. 146. The case of the Brig Nestor, 1 Sumner 57, does not seem to have involved the question now for decision. The language of the judge must be taken as it applies to the case. But in the case of the Barque Clarissa, 2 Story 455, the point ruled is the identical one now made. In that case one of the owners gave a note at six months, for copper furnished. The note was offered to be surrendered at the hearing. The copper was furnished at New York, and it was held that the law of New York, being the same as the law in Michigan, controlled the effect of taking a promissory note, and that such taking was not, in any way a waiver of such lien.

This appears to be decisive of the question, and no higher authority can be desired.

The late decision of the Supreme Court, which, according to the rule of the civil law, sustains the maritime jurisdiction over all our navigable waters, where the commerce is between two or more States, removes all difficulty on the question of jurisdiction. This is the reasonable rule on the subject. In England there are few, if any, rivers navigable above the flowing of the tide. Hence this flowing of the tide was assumed as fixing the extent of the navigability of their rivers. Under similar circumstances, the limitation to the maritime jurisdiction was adopted, at first, in this country. Very few of the Atlantic rivers in our country, are navigable above the flowing of the tide. Our Western rivers are navigable for great distances, where the tide does not flow. On this ground the jurisdiction was applied to our

navigable waters, clearly within the reason of the rule, at first adopted.

The decree of the District Court is reversed.

YAW v. MEAD ET AL.

A law of the State regulating the practice of the State courts, does not apply to the courts of the United States, unless adopted by act of Congress, or by the courts of the United States.

Mr. *Terry* for complainant.

Mr. *Davidson* for defendant.

OPINION OF THE COURT.

This is a bill to foreclose a mortgage ; and a question is made whether the decree for the sale of the land must be made subject to the 111th section of the general chancery act of the States, which provides, that whenever a bill shall be filed for the foreclosure and satisfaction of a mortgage, the court shall have power to decree a sale of the mortgaged premises, &c., but the judge shall not, by such decree, order any such lands to be sold within one year after the filing of the bill for foreclosure.

In the case of *Bronson v. Kinny*, the Supreme Court of the State has held this statute to be binding upon the State courts.

The above act has been passed by the legislature of Michigan, since the act of Congress adopting the practice of the State courts, consequently the statute cannot apply to the courts of the United States, unless specially adopted by them. No such rule has been adopted. The court ordered the sale of the premises, by giving the usual notice, if the money should not be paid in 6 months.

THE UNITED STATES v. THE SCHOONER HELENA.

To bring a case within the 2d sec. of the act of Congress of the 2d March, 1831, entitled an act to provide for the punishment of offenses committed in cutting, destroying, or removing live oak and other timber or trees for naval purposes, the libel must allege that the timber transported by the vessel, &c., to incur a forfeiture, was knowingly by the master, &c., taken from lands reserved for naval purposes, or that the timber so transported, was cut on lands of the United States, not so reserved, and was "live oak or red cedar."

Mr. *Bates*, District Attorney, by Mr. *Watson* for plaintiff.
Mr. *Wilson* for defendants.

OPINION OF THE COURT.

The libel in this case states that the Schooner *Helena* was, on the 1st of August, 1850, seized by the collector of Detroit, within the district of Michigan, as forfeited to the United States for having, with the knowledge of the owner of the vessel, taken on board timber cut on lands belonging to the United States, without proper authority in writing, &c., to transport the same to a port or place within the United States, to wit, from the State of Michigan, to Chicago in Illinois, &c. ; that said schooner transported, as aforesaid, thirty thousand feet of lumber, manufactured from timber cut on the lands of the United States, &c., with intent to defraud the United States, and contrary to the force, form, and effect, of section two of the act of Congress of the 2d March, 1831, &c.

Theodore Newell, owner and claimant of the schooner, by his attorney, filed his answer, that he had not taken on board with the knowledge of the master, owner, or consignee, and transported any timber prohibited by the above act, and for which a forfeiture of his vessel had been incurred, and averred a want of jurisdiction under the act. This answer and plea were subsequently overruled by the court, and the juris-

diction of the court was sustained, and a forfeiture of the vessel was, pro forma, decreed, from which an appeal was taken by the defendant, to this court.

The decision of this case depends upon the construction of the act of Congress above stated.

When we look to the title of the act, and the third and last sections, it would seem to have for its object, the protection of timber specially reserved for the Navy. The title is, "An act to provide for the punishment of offenses committed in cutting, destroying, or removing live oak and other timber or trees reserved for naval purposes." And the third section provides, "that all penalties and forfeitures under the provisions of this act shall be sued for, recovered, and distributed, and accounted for, under the directions of the Secretary of the Navy; and shall be paid over, one half to the informer or informers, if any, or captors, where seized, and the other half to the Commissioners of the Navy Pension Fund," and the said commissioners are authorized to remit, in whole, or in part, any fine, penalty, or forfeiture incurred under the act.

The act, as construed, punishes, on indictment and conviction, by fine and imprisonment, any one who shall cut timber on the public lands. Now it would seem to be rather an anomaly in legislation, to place under the control of the Commissioners of the Navy Pension Fund, and for the special benefit of such fund, all prosecutions by indictment for cutting timber upon the public lands, which comprise several hundred millions of acres. We can readily conceive why timber reserved for the Navy should be under their control, the subject being intimately connected with that branch of the public service. But no reason is perceived why they should exercise the power to remit all forfeitures and penalties arising under the act. Such a power could never have been intended by Congress to extend to trespasses on all the lands of the United States.

And when we consider the policy of Congress in giving, for more than twenty years past, pre-emptive rights to settlers upon the public lands, who have made improvements thereon, it would not seem to comport with a prosecution by indictment, fine, and imprisonment, under this law. This may be speaking against authority, as the Supreme Court decided, in the case of the *United States v. Briggs*, 9 Howard, that for cutting "other timber" than that which has been reserved for naval purposes, an individual under this law may be indicted, fined, and imprisoned. There has not been a settler upon the public lands for the last twenty years, who might not have been indicted, if prosecuted before the pre-emption right to the land was given to him by law.

Now here the act of trespass upon the public lands is very differently treated by Congress, according to this construction. In the one case an individual is indicted, fined, and imprisoned. In the other, the law gives him a right to the land over all others, where he has made an improvement upon it. An improvement cannot, very well, be made in a timbered country, without cutting timber. And one cannot but reflect how fortunate one individual is, who secures the land by his trespass, over the other who is punished, by indictment, fine, and imprisonment. Could Congress have intended to punish in the one case, and reward in the other, trespasses, equally in violation of law? It is true, some trespassers cut the timber and convey it off the ground, whilst others remain on the ground, and continue the trespass, by cutting the timber, and using it for their own purposes. To the trespasser with a continuando the land is given, whilst the other is indicted, fined, and imprisoned. The settler will of course select the most valuable tract, in reference to the soil and timber, the other selects the best timber without reference to the soil.

In view of the liberal policy of Congress to settlers upon the public lands, I had supposed that the above act might be

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so construed, as intended to protect, by the stringent means provided, only timber reserved for naval purposes; or, at least, timbers used for the Navy, as "live oak and red cedar."

The 1st sec. of the act declares, "That if any person shall cut, &c., any live oak or red cedar tree or trees, or other timber, standing, growing, or being on any lands of the United States, which, in pursuance of any law passed, shall have been reserved or purchased for the use of the United States, for supplying or furnishing therefrom, timber for the Navy of the United States;" "or, if any person shall remove, &c., from any such lands which shall have been reserved or purchased as aforesaid, any live oak or red cedar tree or trees, or other timber," &c.; "or if any person or persons shall cut, &c., any live oak or red cedar tree or trees, or other timber on, or shall remove, &c., any live oak or red cedar trees, or other timber, from any other lands of the United States, acquired or hereafter to be acquired, every person so offending," &c.

In the case above cited of the *United States v. Briggs*, under the words, "other timber," from any other lands of the United States, or "hereafter to be acquired," &c., the person charged was held liable to be indicted for cutting timber under the statute, and that is the extent of the decision. It must be admitted that the words referred to, if not restrained by other provisions of the act, may be so construed. And this construction having been given to them by the Supreme Court, it concludes all inferior jurisdictions.

But the question as to the forfeiture of the vessel, is governed by the second section. That provides, "that if the master, owner, or consignee of any ship or vessel shall, knowingly, take on board any timber cut on lands, which shall have been reserved or purchased as aforesaid," &c.; "or shall take on board any live oak or red cedar timber cut on any other lands of the United States, with intent to trans-

port the same, the ship or vessel on board of which the same shall be taken or seized, shall, with her tackle, apparel, &c., be forfeited to the United States," &c.

Now, the question here arises, whether the vessel incurs a forfeiture under the above provision, by transporting, &c., any timber not taken from lands reserved for naval purposes, or if taken from other lands of the United States, not so reserved, which is not "live oak or red cedar." The words of the section are so explicit, that there would seem to be no doubt of their meaning. The first part of the provision undoubtedly applies to lands reserved, and it is equally clear that the second part embraces lands not reserved. A forfeiture is incurred if the vessel take on board any timber cut on the lands reserved; but to incur a forfeiture, under the second provision, for taking timber from lands not reserved for naval purposes, it must be "live oak or red cedar."

It is insisted that the words in the 2d section, "purchased as aforesaid," refers to the words of the first section, "or other timber from any other lands of the United States, acquired or hereafter to be acquired." That under the construction given to the first section, these words subject the person removing the timber to an indictment, fine, and imprisonment, is admitted; but the words "purchased as aforesaid" cannot, by any fair interpretation, be made to refer to any other words in the first section, than the identical words which are there used. "Or if any person or persons shall remove, &c., from any such lands which shall have been reserved or purchased as aforesaid," is the language of the first section. And they are the same words used in the second section, and are used in the same connection.

That this is the correct construction is manifest from the fact, that the second section also provides, in the words which follow, that "live oak or red cedar" taken on board from other lands than those reserved, shall cause a forfeiture of

the vessel. Now, if the words in the 2d section, "purchased as aforesaid," refer, as contended, to lands not reserved, this provision was unnecessary. It limits the forfeiture to "live oak and red cedar;" but if the reference contended for be the true construction, then the forfeiture of the vessel is incurred, for transporting any kind of timber cut on the public lands. If timber of any kind, even for fire-wood, were taken on board from an improvement of an occupant, to whom a pre-emptive right was subsequently given by law, the vessel would be forfeited. Such a construction would make the 2d sec. inconsistent in its provisions, which ought never to be done by construction. It would impose a forfeiture of the vessel for taking on board timber from reserved lands, from lands not reserved, and then only for taking from unreserved lands, "live oak and red cedar."

It is immaterial what an Attorney General may have suggested as necessary or proper to prevent trespasses, at one time, or what may be supposed to have been the intention of Congress, from circumstances or facts out of the law; their meaning must be ascertained from the language of the act. And where that language is susceptible of but one construction, no other can be given. As now construed, the law punishes trespassers by fine and imprisonment, when convicted on an indictment; civil actions for trespass may be brought, and under an early act, the troops of the United States may be used in forcing trespassers from the public lands. These remedies would seem to be ample to protect the public property. If, in addition to these, the forfeiture of the vessel used be necessary, Congress can so provide. It is enough to say that, in the act under consideration, they have not so provided, in regard to the vessel which shall transport timber from public lands not reserved for naval purposes, unless it be "live oak or red cedar." And such a provision shows that they did not intend to embrace other timber.

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The charge against the vessel in the libel is general, of having taken on board a large amount of lumber, and transported it, &c., without an allegation that it was taken from lands reserved for naval purposes, or that it was "live oak or red cedar;" the case, therefore, is not brought within the statute; the procedure for the forfeiture of the vessel cannot be sustained. The decree of the District Court is, therefore, reversed, and the libel is dismissed. This decision will not interfere with the procedure of the government against the timber on board of any vessel, which has been taken from the public lands.

HUNTER, USE OF, &C. v. KIBBE & KIBBE.

The acceptor of a bill, which came into his possession after it had been put in circulation, is presumed to be the owner of the bill, and entitled to recover its proceeds from the drawer.

Mr. *Davidson* appeared for the plaintiff.
Messrs. *Emmons & Tams* for defendants.

OPINION OF THE COURT.

This action is brought against the drawers of a bill of exchange, for fifteen hundred dollars. The plaintiffs bring the action as acceptors of the bill.

On the trial it was objected that the possession of the bill was not sufficient to show the right of the plaintiffs to maintain the action. In 2d Vol. of Ev., sec. 170, Greenleaf, it is said: "Where the action is by an accommodation acceptor, against the drawer, either for money paid, or especially for not indemnifying the plaintiff, in addition to the proof of

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drawing the bill, and of the absence of the consideration, the plaintiff should prove payment of the bill by himself, or some special damage or liability to costs, by reason of his acceptance. "And the case of *Pfiel v. Vanbatenberg*, 2 Camp. 439, and also *Baily on Bills*, 304 to 308 are referred to.

The acceptance of the bill is *prima facie* evidence of funds of the drawer in the hands of the acceptor. But in this case the acceptor accepted for the accommodation of the drawers. The bill was negotiated, and has come back to the acceptor. Under these circumstances, we think the possession of the bill is *prima facie* evidence of the right of the holder to sue. In the case of *Dugan v. The United States*, 3 Wheat., the court say: "After an examination of the cases on this subject, (which cannot, all of them, be reconciled), the court is of opinion, that if any person who indorses a bill of exchange to another, whether for value, or for the purpose of collection, shall come to the possession thereof again, he shall be regarded, unless the contrary appear in evidence, as the bona fide holder and proprietor of such bill, and shall be entitled to recover, notwithstanding there may be on it one or more indorsements in full, subsequent to the one to him, without producing any receipt or indorsement back, from either of such indorsers, whose names he may strike from the bill or not, as he may think proper."

We think the case before us is within the above case. The possession of the bill, under the circumstances, is evidence, *prima facie*, of the right to sue, and to the contents of the bill. In the same section above cited, Mr. Greenleaf says: "The mere production of the bill by the plaintiff is not sufficient proof that he has paid it, unless he shows, that it was in circulation after it was accepted."

The motion to dismiss the suit is overruled.

DOW ET AL. v. CHAMBERLIN ET AL.

A deed absolute upon its face, may be shown by parol evidence, to have been intended as a security.

But parol evidence is not admissible to contradict a written instrument.

Where a deed was given, with warranty, and a defeasance that the grantor should have a re-conveyance, if within twelve months, he should pay the debt, although in the meantime the grantee had a right to sell the whole or a part of the property at a price fixed, in payment of the debt, the deed will be considered as a security.

A statute of a State which regulates the procedure, on a bill of foreclosure, does not apply to the courts of the United States.

They do not derive their chancery jurisdiction, or their rules of practice, from State authority.

Mr. *Lathrop* for complainant.

Mr. *Emmons* for respondent.

OPINION OF THE COURT.

This is a bill to foreclose a mortgage, and the question is, whether the property was given in payment or as a security.

The plaintiff recovered against the defendant, Samuel Chamberlin and one David M. Hinsdale, a judgment for the sum of \$756 93 and costs, on which an execution was issued on the 16th of January, 1847, which was levied upon certain real estate as the property of Chamberlin, and was advertised for sale. The counsel for the plaintiffs attended on the day of sale, and on examination found the property levied on much encumbered, so as to be insufficient to satisfy the judgment. And it was agreed that the levy should be released, on the defendant's executing a deed of general warranty to Dow, one of the plaintiffs, for certain lots in the village of Pontiac, which deed was duly executed.

After the delivery of the deed, the following instrument was drawn up by the Attorney of the plaintiffs, and delivered to the defendant :

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"Whereas, Samuel Chamberlin has this day executed to Marcus F. Dow, a warranty deed for lots 95, 96, 97, 107, 112, and 113, of the eastern addition of the village of Pontiac, to apply on an execution issued from the United States Court in favor of Dow and others, against said Chamberlin and D. M. Hinsdale. Now this witnesseth, that the said Chamberlin or D. M. Hinsdale shall, at any time, within the ensuing twelve months, be entitled to the privilege of redeeming said lots, on payment of the said judgment so rendered against them by the said United States Court in favor of said D. K. and S.; and the said plaintiffs hereby agree to reconvey said premises to said Chamberlin on payment of said sum of money as aforesaid; plaintiffs reserving, however, the right to sell any part of said premises when opportunity offers, provided they do not sell them at a less rate than \$155 per lot, as this day appraised by persons named; and shall apply the proceeds thereof in liquidation of said judgment pro tanto."

Parol evidence has been heard, not to explain any matter upon the face of the above instrument, or of the deed, but to show, beyond the instruments, the nature of the transaction.

The parol testimony casts very little light on the transaction. The statements of the witnesses were made from general impressions, the words spoken not being recollected. Buddington's impressions were, that Chamberlin refused to give the lots as collateral security, as that would take away his control over them, and leave the debt still unpaid. And Duffield says that twelve months were given to Chamberlin to sell the property. This placed the property within his control, unless each lot should sell for one hundred and fifty-five dollars. This may have removed Chamberlin's objection to giving a lien on the lots. At least it is as reasonable a conclusion as any which can be drawn, from the very vague parol testimony in the case. We must look to

the two instruments chiefly, to ascertain the character of the transaction.

The deed was absolute upon its face, and conveyed the fee, with warranty, to the grantee. And this being done in payment of the judgment, it is contended, the transaction was closed. That this was not the understanding of the parties appears from the fact, that the plaintiffs had the right to sell the lots at the price fixed, the proceeds to be paid, pro tanto on the judgment. Now, if the judgment had been considered as discharged by the conveyance of the lots, why should the price of the lots be limited, and, particularly, why should the proceeds be applied in part discharge of the judgment? It is no satisfactory answer to this, that Chamberlin was desirous to have a re-conveyance of the lots, or, at least, a part of them, and therefore a limitation on the price was fixed. This limitation might have been agreed upon, without providing that the money received should be paid on the judgment. If that judgment had been discharged by the conveyance, of what importance could it be that the money received on the sale of the lots, should be paid on it? Could the parties have supposed that a double discharge of the judgment was necessary?

It is true the defeasance was written by the plaintiffs' attorney, to secure a right to Chamberlin which he deemed of some importance; and which he received, and it is, therefore, evidence showing, to some extent, the nature of the agreement. It does not appear that any evidence of the payment of the judgment was required. It would be an extraordinary transaction if an individual should pay a judgment in land or money, and take no evidence of the fact. The plaintiffs were not required to enter upon the record nor on the execution, satisfaction; and nothing seems to have been said of the propriety of giving a receipt. The written instruments show nothing in relation to the judgment, except

that the proceeds of the lots sold were to be applied, pro tanto, to its payment.

The deed and the defeasance are to be construed, as though they were but one instrument. The deed is absolute on its face, but to be defeated, and a re-conveyance made, if, within twelve months, Chamberlin should pay the judgment. The privilege of selling the lots, at a fixed price, by the grantee, was not exercised. If it had been, the judgment would have been discharged, in whole or in part, by a sale of a part, or the whole of the property, with the consent of Chamberlin. The effect of the arrangement was, to give Chamberlin twelve months to pay the money, which, if paid, brought back to him the land conveyed. We are satisfied that the deed was given as a security, and that it must be treated as a mortgage.

It is clear that no personal liability is imposed by this transaction on Chamberlin, except by the general warranty of the title to the lots. But the liability under the judgment remains, it not having been paid by the conveyance of the lots. The suggestion that it was discharged by the levy on the unencumbered property, which levy was afterwards released, is not maintainable.

The defendant insists, that as the mortgage was given to secure, collaterally the judgment; and, as the bill states, an execution had been issued on the judgment, since the mortgage was executed, on which nothing has been done or return made, that the complainants cannot proceed until they have attempted to collect the judgment.

The 109th sec. of the general chancery act of this State provides, "if it shall appear that any judgment has been obtained in a suit at law, for the moneys demanded by such bill, (of foreclosure) or any part thereof, no proceedings shall be had in such case, unless to an execution against the property of the defendant in such judgment, the sheriff shall have returned that the execution is unsatisfied in whole or in part,

and that the defendant has no property whereof to satisfy such execution, except the mortgaged premises."

Under this statute it has been held, 1 Walker's Chan. Rep. 387, that a bill filed to foreclose a mortgage given to secure a judgment, is demurrable, unless it appear in the bill that an execution has been issued on the judgment, which has been returned unsatisfied, in whole or in part, and that the defendant has no property, except the mortgaged premises, to satisfy the judgment.

The complainants, in their bill, allege that on the 9th of October, 1848, they caused an alias writ of fieri facias to be issued on the judgment, yet no proceedings were had on said execution, and that the life of the same has long since expired, to wit, on the first Monday of December, 1848. That said execution is in their possession ready to be produced to the court.

It is too late to make this objection, it is contended, at the final hearing. The statute is peremptory, but the court are not bound to take notice of it unless it shall be set up in the answer, or by demurrer where the facts appear upon the face of the bill. In the State courts the objection would be fatal to a further procedure in the case. But this provision of the statute being a rule of practice, belonging to the remedy, does not apply to the Circuit Court of the United States; neither its jurisdiction nor practice in chancery is derived from or governed by the State laws. In several of the States which have no courts of chancery, such a jurisdiction is exercised by the courts of the United States.

The court will direct a sale of the mortgaged property, and enjoin the plaintiffs from issuing an execution on the judgment, until the order of this court.

CIRCUIT COURT OF THE UNITED STATES.

ILLINOIS—JULY TERM, 1851.

THE UNITED STATES *v.* BENJAMIN A. MACOMB.

The Circuit Courts of the United States may grant new trials in criminal cases, on the application of the defendant, after a conviction by a jury.

A person was arrested and taken before the proper officer, charged with robbing the mail. At the preliminary examination, a witness, since deceased, testified in relation to the offense. The accused was present, and his counsel cross-examined the witness. Witnesses were permitted to prove, on a trial before a jury, under an indictment found for the same offense, what the deceased witness testified at the preliminary examination.

The rules of evidence in civil and criminal cases, in this particular, are the same.

It is sufficient, in such case, to prove substantially all that the deceased witness testified upon the particular subject of inquiry.

Mr. *Williams* District Attorney for plaintiff.

Mr. *Ferguson* for defendant.

OPINION OF JUDGE DRUMMOND.

The defendant was indicted under the 21st and 22d sections of the Post Office Act of March 3, 1825, 4 Statutes at Large 107-9, for stealing from the mail a packet containing

a land warrant, and fifty dollars in bank notes. It appeared that the offense was committed near Dixon, on the 1st of August, 1850. The packet was mailed at Freeport on the 30th of July, addressed to Dixon. On the day the offense was committed, the defendant was arrested at the latter place, and a few days afterwards, a preliminary examination took place there before an officer. The defendant was present with his counsel, at the examination, during which one Hurlbut, since deceased, who had enclosed the land warrant and bank notes, and directed and posted the letter, testified as a witness for the United States. Hurlbut was subjected—to use the language of the witnesses introduced here—to a long and tedious cross-examination by the counsel of the defendant. An objection was taken by the counsel of the defendant at the trial in this court because witnesses were permitted to state to the jury what Hurlbut had sworn to on the preliminary examination. This objection having been overruled, and the defendant convicted by the jury, his counsel has made a motion for a new trial, and it having been argued before me, I have examined the objection with more attention than I was able to bestow upon it at the trial.

No question has been made of the power of the court to grant a new trial on the application of the defendant. Indeed, notwithstanding the doubts which have been thrown on that point heretofore, and the opinion expressed by Judge Story in *The United States v. Gibert*, 2 Sumner R. 19, I should have no hesitation in granting a new trial to a party who, I thought, was wrongfully convicted, more especially if it were caused, in any degree, by the erroneous ruling of the judge at the trial. See *The United States v. Harding and others*, Wallace, jr. R. 127.

In this case there was other evidence, independent of the testimony of Hurlbut before the committing officer, which might have authorized the jury in finding their verdict; but there can be no doubt that his testimony may have had much

influence upon the jury, and, under the circumstances of this case, I should grant a new trial if I thought the testimony should have been excluded. After reflection, however, and all the examination I have been able to give to the subject, I am of the opinion that the ruling at the trial was correct.

The objection resolves itself into the two following propositions: First. The declarations of a deceased witness made at a former trial between the same parties, upon the same subject matter can never be given in evidence *in criminal cases*. Secondly. If they can be, it is only when the persons who are called on to give the declarations of a deceased witness, can repeat the precise words of the witness, and it being admitted that that was not done here, the testimony ought to have been rejected.

It is well known that there has long been a difference of opinion upon both these points.

It is not controverted that the testimony of a deceased witness given at a former trial between the same parties, in the same issue, is admissible in civil cases. There seems no difference of opinion as to that. But some of the authorities &c., deny the application of the rule to criminal cases.

A case which is generally cited as deciding that it does not apply to criminal proceedings, is that of Sir John Fenwick in 1696. He was charged with being concerned in treasonable projects, but the witnesses who were expected to prove his guilt having left the country, there was no sufficient legal evidence to convict him of treason before the courts of law. The government resorted to a bill of attainder in parliament. A question arose whether the deposition of a person named Goodman, who was absent, taken before a justice of the peace, when neither the defendant nor his counsel was present, should be read as evidence? It was decided in the affirmative on the ground that the Commons were not obliged to adhere to the rules established in Westminster Hall. During the discussions which took place in that case, it was said

that such evidence could not be admitted in criminal cases in a court of law. Of course it is clear that such testimony could not be admitted in a court of law; for, first, the witness was living; and, secondly, the defendant had no opportunity of cross-examining him; and however the authorities may differ as to the first, they all agree as to the second point, that being an indispensable prerequisite to the introduction of the testimony. Mr. Parke relies upon this case for his assertion that there is a distinction between civil and criminal cases in this particular. The same opinion is expressed in *Finn v. Commonwealth*, 5 Randolph 701, though the question there was, whether the testimony was admissible where the witness was absent. In *Crary v. Sprague*, 12 Wend. 41, Judge Nelson, who delivered the opinion of the court, while he admits it is questioned by high authority, and cites Hawkins and Parke, states his own opinion, that the testimony is admissible in criminal cases. In the *People v. Newman*, 5 Hill 295, while deciding that nothing but the death of the witness would authorize the admission of such testimony under the law of New York, the court say, if the rule were otherwise in civil cases, they thought it ought not to be applied to criminal proceedings. And they distinctly waive the question whether it would be allowed at all in criminal cases, if the witness were dead.

The *Commonwealth v. Richards*, 18 Pick. R. 434, was a case very much like this. A witness who had testified against the defendant at a preliminary examination before a magistrate, having died, witnesses were called to state what the deceased witness had sworn at the examination. They were permitted to testify, and the case went to the Supreme Court of Massachusetts on this and another point. It was like this a case of an offense which was investigated in the first place before an officer, and the party was afterwards indicted for the same offense. The case was reversed, as we shall presently see, on another ground, but the court examined at

some length the authorities for the purpose of ascertaining whether there is any distinction in this particular between civil and criminal proceedings, and came to the conclusion that there is none.

In the *United States v. Wood*, 3 Washing. C. C. R. 440, which, like this, was a case of robbing the mail, though the testimony was rejected because the precise words could not be given, no allusion whatever is made to any difference between civil and criminal cases.

The King v. Joliffe, 4 T. R. 290, in which Lord Kenyon used these words in relation to the rule which has been since so often quoted, was a criminal information, and he speaks of no distinction.

Most of the modern elementary writers, Phillips, Starkie, Roscoe, and Greenleaf advert to the rule as one of general application in all cases. And Russell, particularly, in his valuable little treatise of the law of Evidence, which he has added to his work on Crimes, says expressly, the rule applies to criminal prosecutions, 2 Russ. 683.

By the statutes of Philip and Mary, magistrates were directed and required to take the depositions of witnesses in certain criminal cases, and it has always been held, under these English statutes, that if the defendant were present at the taking of the deposition, and the witness were dead, it might be read on the trial as evidence. And yet there was nothing in the statutes from which it could be inferred that depositions were to be received as evidence. But the law having sanctioned them, it seems they became admissible upon general principles, provided the defendant was present, had the liberty to cross-examine, and the witness was dead. See note to the case of *Rex v. Smith*, 2 Starkie R. 208 ; 3 Eng. Com. Law R. 316 sec. 6. These statutes require the magistrate to take the examination, as well of the prisoner as of the witnesses, in writing ; still, if this was not done, it seems to have been the practice to admit the statements of the de-

fendant and witnesses ; though if the examination were reduced to writing, that must be produced. *Rex v. Fearshire*, 1 Leach 240 ; *Rex v. Jacob*, 1 Leach 347 ; *Rex v. Lasube*, 2 Leach 625.

By the acts of Congress, the officers before whom the persons charged with the commission of offense, are taken, have the right to allow bail. This implies the power to examine the facts of the case to ascertain whether the party shall be discharged, committed, or admitted to bail. The law does not require that the examination shall be reduced to writing. It was not done in this case. As a matter of practice, however, it is frequently done, and generally it is desirable that it should be.

See the authorities collected in 2 Cowen & Hill's notes to Phil. Ev. 571, or note 437, where the opinion is expressed that the statements of a deceased witness are admissible in a criminal the same as in a civil proceeding.

Without going into a further examination of the authorities in this branch of the case, it might, with some force, be argued that the weight of authority sustained the view of the court at the trial, but, however this may be, it seems plain that amidst so great a conflict of authorities, the court is at liberty to decide the question upon principle. Why should not the rule in civil and criminal proceedings be the same in this respect ? The great object of all judicial investigation is to ascertain facts, and to do justice between the parties. In criminal cases, to shield the innocent, and punish the guilty. In accomplishing this, however, courts must act in conformity with some general rules founded in reason and experience. But after all our efforts we only make an approximation to this object. Many an innocent man has been and will be punished,—many a guilty one go free. If it be, on the whole, a sound rule to admit the declarations of a deceased witness, made on a former trial, in a case involving property or reputation, it is equally so in cases involving life

and liberty. The ground upon which we proceed in each case is the presumption of the truth of the declarations, they being subjected to the tests which the law recognizes,—the presence of the accused, and the right of cross-examination. The admissibility of this species of evidence depends upon the necessity of the case, and upon a well established exception to the rule which excludes hearsay, if, indeed, we may not in one sense, regard it as original testimony. We receive it because it comes up to one of the demands of the law ; it is the best evidence which can be produced. Though the witness has been once confronted with the defendant, and, in his presence, been sworn and cross-examined, it may be admitted, it is more satisfactory to have him again produced before a jury at a second trial, but being dead, it is impossible, and we resort to the next best source of truth,—his sworn statements already made. I think the law of evidence, as now administered, is quite stringent enough in excluding testimony, and I confess I feel a strong disposition to admit it in all cases where it can be done without violating any principle, or controverting any settled rule of law. It seems to me that to reject this kind of evidence, either in a civil or criminal case, is shutting out, without sufficient reason, one of the lights that should guide us in our judicial investigations.

The tendency of the courts in modern times in criminal cases is to afford the jury every opportunity that is consistent with the rules of law to determine the guilt or innocence of the accused, and I think they are peculiarly entitled to this sort of testimony, giving to it such weight as is proper under all the circumstances of the case. If the rule operates so as to expose guilt, it may protect innocence. There are anomalies enough in the law of evidence now without increasing them unnecessarily. In a criminal case involving life itself we admit, as testimony, declarations made by a person not under oath, and where the accused was not present.

And why? From the supposed necessity of the case, and because declarations made by a person under the danger of impending death, are regarded as if made upon oath in a court of justice. We confine this rule of evidence to cases of homicide. But in the instance we are now considering, we have the sanction of the oath itself, administered by competent authority,—and the cross-examination of the witness,—the great test of truth, by the party; and there is thus every reasonable safeguard thrown around the claims of the public on the one hand, and the rights of the accused on the other.

Assuming, then, that the rule in civil and criminal cases ought to be, and is the same in this particular, we come next to the other part of the subject, and one not less controverted. I might, perhaps, put this portion of the case upon the ground that no objection was taken at the trial that the witness did not repeat the identical words of Hurlbut; but I do not choose to rest it there, having formed a decided opinion on this point. I am disposed to treat it as if the objection on that ground had been actually made at the time.

The question is, whether a witness, when he is called upon to give the testimony of a deceased witness at a former trial between the same parties, in order to render it admissible, must repeat the precise words used by the witness? or whether it is sufficient if he state the substance of what was sworn?

Those who contend for the more narrow doctrine that the very words used must be repeated, refer to Lord Kenyon's language in *Rex v. Joliffe*, already mentioned. He says, in referring to the instance of Lord Palmerston, in which, on all hands, it was agreed that this kind of testimony was admissible, "but as the person who wished to give Lord Palmerston's evidence, could not undertake to give his words, but merely to swear to the effect of them, he was rejected." "He ought," said the same judge, in the case of *Ennis v.*

The United States v. Benjamin A. Maccomb.

Denisthorne, referred to in 1 Phil. Ev. 219, "to recollect the very words, for the jury alone can judge of the effect of words." Some judges have interpreted the language of Lord Kenyon, to mean that a person shall not state the effect, that is, give his own inferences as to what the deceased swore, but that he may state the very words substantially, that is, he must use the words of the witness, and not his own; and placing this construction on the rule, have agreed with him. Others, on the contrary, have denied his position altogether, and have insisted that the persons may give the substance or effect of what the witness swore; other judges, again, maintain that the meaning of Lord K. was, that the whole of the very words of the witness must be given. In restricting the rule within these limits, they admit that it is a virtual destruction of the rule itself.

In New York and Massachusetts, the decisions of whose courts we hold in high respect, it seems to be considered that the precise words must be used, and not the substance. This was the opinion expressed in *Wilbur v. Seldon*, 6 Cowen 162, "The words must be given, and not what is supposed to be the substance of the testimony." The case of *Commonwealth v. Richards*, already cited from 18 Pickering, is a fair illustration of the effect of restricting the rule as contended for. A person, since dead, testified as a witness before the magistrate at the preliminary examination of the defendant, charged with a criminal offense. On the trial before the jury, two witnesses were sworn, and were permitted to repeat what the deceased witness had said before the magistrate. These witnesses did not repeat the exact words used, but only the substance of them from recollection, aided by notes taken at the time. One of the witnesses said he was confident he stated the substantives and verbs correctly, but was not certain as to the prepositions and conjunctions. The Supreme Court reversed the case because these witnesses were permitted to state, under these circumstances, what the de-

ceased witness had testified. The court, in giving its opinion, admits that such strictness will generally exclude that kind of evidence. They cite *Rex v. Joliffe*, *The U. S. v. Wood*, and *Wilbur v. Seldon*, authorities already mentioned. The question came up again in Massachusetts in *Warren v. Nichols*, 6 Metcalf 261. In this case the witness said he could not give the words or precise language of the deceased witness, but he could give the substance of the testimony. The court differed in opinion, but a majority of the court adhered to the rule down in Richards' case. I understand, however, the majority of the court to consider that the effect only of what the deceased witness said could be stated, and it was to be excluded on that ground. "As he could only give the substance *and* effect of the testimony, but not the language in which it was given," it should be rejected. And yet, in another part of the opinion, the majority of the court say, "The witness must be able to state *the language* in which the testimony was given, *substantially and in all material particulars*," that is, the witness must use the language of the deceased witness, and not his own; and it is to be inferred if they had supposed this had been done, they would have held it sufficient, though this *principle* is not easily reconciled with the *decision* in 18 Pickering, to enforce and strengthen which seems to have been the chief object of the opinion pronounced by the majority of the court in *Warren v. Nichols*. It would seem to be important in considering these two cases to bear in mind a distinction which many of the courts make, and which the court in Massachusetts seems not to have had in view, between the effect of testimony, and the substance of it, or of the words used.

In Indiana the same course has been followed. In *Ephraim v. Murdock*, 7 Blackf. 10, the court admitted there were conflicting decisions, but thought the weight of authority was in favor of the more stringent doctrine. And yet that court resisted an effort of counsel to make the same principle appli-

cable to declarations *in extremis*. Where a person was indicted for murder, the witness could only repeat the substance of what was said, and not the exact words of the party, *in extremis*, and the court held this sufficient; *Ward v. The State*, 8 Blackf. 101.

On the other hand in Pennsylvania the courts held that it is sufficient for the witness to state the substance of what was sworn on the former trial; *Cornell v. Green*, 10 Serg. & Rawle 14. The court, while not very clearly distinguishing between the substance and effect of evidence, enforces its view of the law in a very convincing manner. The judge says: "I cannot see why the same necessity which opens the way for secondary evidence of the very words of a deceased witness, should not open the way also for the substance of his testimony when his very words cannot be recollected; or discern the policy of a rule which should shut out the little light that is left, when it is *all* that is left, merely because it may not be sufficient to remove everything like obscurity." And this was followed in subsequent cases, *Smith v. Lane*, 12 S. & R. 34; *Chess v. Chess*, 17 S. & R. 409. This construction of the rule seems to be approved by the courts of Maryland and Virginia, and by other States. *Gilderstein v. Curmung*, 10 Alabama R. 260.

The question arose in a very late case in Ohio, *Wagers v. Dickey*, 17 Ohio R. 439, and the case is important as showing the rule adopted by the Supreme Court of that State, out of conflicting decisions upon the subject throughout the State. In that case the witness was permitted to state in substance what had been the testimony of the deceased witness; and the court says: "that if the strict rule is to be adopted, it amounts to a total interdict of a most important branch of secondary evidence, a branch of evidence especially important under our system of new trials." And the judge who pronounced the opinion of the court in allusion to the strict construction of the rule uses this strong language:

"The evils flowing from it would, in my judgment, were the law ever so well settled, justify a court in changing the law."

In Illinois it seems to be held sufficient for the words of the witness to be given substantially, and not the result of the evidence; *Marshal v. Adams*, 11 Illinois R. 37.

All of our most approved writers on the law of evidence, Phillips, Starkie, and Greenleaf, appear to prefer the most liberal construction of the rule. But it is needless to multiply authorities on the one or the other side of this vexed question. Most of the authorities (except the recent ones) can be found in 2 Cowen & H. notes to Phil. Ev. 578, note 442.

It might be matter of curiosity to examine how far the authorities could be reconciled by observing the distinction between the effect and the substance of the words used by the deceased witness,—a familiar illustration of which occurs in proving the words laid in a declaration in an action of slander. There it would not be sufficient to prove words to the effect of those used, nor even equivalent words, and yet it is enough to prove *the words* substantially as laid in the declaration.

It is a singular practical commentary upon the rule that, in those cases where the courts maintain the strict doctrine, scarce an instance can be found where the evidence has come up to the demands of the court, while it not unfrequently has happened where the courts have been more liberal in their construction of the rule, they have shown a strong disposition to restrain it within reasonable bounds; *Watson v. Gilday*, 11 S. & R. 337; *Wolf v. Wythe*, 11 S. & R. 149.

In our country new trials are so common that it often happens the testimony of a deceased witness is offered to be proved on a second trial. It is, therefore, a question of considerable practical importance. I have no hesitation in saying that I regard the more liberal view of the rule as

being most in accordance with sound reason, and with the principles of evidence. All the analogies of the law are against the strict rule. Take the very common case of proof of verbal admissions of a party to the record. Do we reject the testimony of the witness who proves these admissions because he cannot repeat the precise words of the party? It is matter of every day's practice to admit the evidence if he swears to the substance of what the party said. Another common case is that of lost writings. If evidence is in writing, it must, ordinarily, be produced, if in existence, and in the power of the party. If a written instrument is lost or destroyed, we resort to the next best evidence. Suppose that it is the memory of a witness who has seen and read the instrument. If he were introduced to a court, and should testify that he could state *the substance* of the words used in the instrument—that he was confident of the substantives and verbs, but not so certain of the prepositions and conjunctions (like the case in *18th Pickering*) would his testimony be excluded because he could not repeat the *exact words* of the instrument? More especially, if, as he read it, he had taken notes of the contents, to assist his memory? I apprehend no court in this country would reject such testimony. In perjury we only require proof of the substance of the words upon which the perjury is assigned. We have already adverted to the case of slander, and to declarations, *in extremis*, in cases of homicide. Take one of the few instances to which the majority of the court in *Warren v. Nichols* think the evidence must be confined,—a verbal notice of any fact given to a party. It is often necessary for us to prove such a notice. And would the fact that notice was given be rejected as evidence because the writer, who was present, and who testifies to it, cannot repeat every preposition and conjunction made use of by the party in giving the notice? Most certainly even that court would say it is enough to prove it substantially.

Besides, to admit the rule, and restrict it, as is sometimes done, makes it operate most unfairly. If the examination of a deceased witness has been short, and his words few, very possibly a person might recollect the precise words, but in a long and tedious examination, it would be morally impossible for any one to recollect all that the witness said ; more particularly as the authorities agree that the witness must be able to state all that was said on the particular subject by the deceased witness, as well on the direct as cross-examination. Now we know that the examination of a witness generally consists of interrogatory and answer, and if the precise words are to be given, then, to be consistent, the question must be given as well as the reply. Take the case we are now considering as an illustration, and we will see the impracticability of this. In this case the witness, Hurlbut, was cross examined at great length as to the identity of the bank notes, which he alleged were the same as those found on the defendant. Every variety of question which the ingenuity of counsel could devise, was employed. Now, the witness introduced here, could testify to the substance of all that Hurlbut said in this examination, but to repeat *the whole* of what he said was clearly impossible ; and ever will be in such cases unless it is *all* reduced to writing at the moment. I cannot persuade myself that it is reasonable to reject the substance of what he said merely because we cannot have *the very words*. I understood the witness to say that he repeated substantially all that the deceased witness said, as well on the direct as on the cross-examination upon what was the subject of inquiry in this case, and therefore I think it was admissible.

It seems as though the only safe course to pursue is to give this construction to the rule ; or reject it altogether as some judges appear half inclined to do. To acknowledge the soundness of the rule one moment, and the next trammel it so as effectually to destroy it, seems like trifling. It is

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said that it is a dangerous kind of evidence which, if resorted to, may be the means of doing injury. But the same may be said of every species of secondary evidence, and even of primary evidence itself. It is the lot of humanity. The main point is, Does the rule stand upon well established principles of evidence? Will it, on the whole, tend to promote the great ends of justice? The reason of the thing, and the authorities in the law have answered these questions in the affirmative.

Believing that the rule rests upon clear principles, I think it should receive such an interpretation as shall make it of some practical utility, and not a dead letter.

GEORGE EDWARDS, JR., v. BENJAMIN BOND.

When a person is summoned as a juror, and, at the same term, is subpoenaed by the United States as a witness, and attends in obedience to each process, and, according to the practice of the court, makes affidavit of such attendance, he is entitled to compensation for each service.

And upon the facts being shown by petition, and admitted by the marshal, a rule absolute was entered directing the marshal to pay the amount.

Mr. *Edwards* for plaintiff.

Mr. *A. Williams* District Attorney for defendant.

OPINION OF JUDGE DRUMMOND.

In this case the plaintiff has presented a petition setting forth that at a former term of this court he was summoned as a juror, and at the same term was subpoenaed as a witness on behalf of the United States in a certain cause pending in this court. The petition alleges that he attended both as a juror and witness, and that according to the practice of the court he filed an affidavit of such attendance with the clerk, show-

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ing the number of days he was present in court, and the distance in miles of his place of abode from Springfield, where the court was held. The petition also states that he claimed of the marshal his compensation for each service, but that the marshal has paid him for one service only, and absolutely refuses to pay him for the other. He asks for a rule on the marshal requiring him to pay the amount he claims.

The marshal has filed an answer in which he admits the facts stated in the affidavit to be true. He also admits that he has sufficient funds of the United States in his hands to pay the plaintiff, but gives as a reason for refusing payment that such claims has not been allowed by the accounting officers of the Treasury Department at Washington.

There is no controversy between the parties as to the amount claimed. It is conceded that the sole question is, whether having rendered the service as juror and as witness at the same time, he is entitled to compensation in both capacities.

The sixth section of the act of Feb. 28, 1799, 1 Statutes at Large, 626, provides for the compensation of jurors and witnesses in the courts of the United States, and after prescribing the per diem and mileage of each grand and petit juror, declares that the same allowance shall be made witnesses as to jurors. The counsel of the government admits that he has not been able to find any decision of a court which would defeat the claim of the plaintiff; and no act of Congress exists which provides for the contingency.

I am called on to decide whether the claim of the plaintiff is in conformity with law.

The ordinary mode of bringing an individual into court to serve as a juror is by summoning him on the venire. That being done, he is subject to the court, and if disobedience follow, he can be punished for it. In this instance the plaintiff was summoned on the venire. In obedience to it he served

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as a juror. He was called into court to discharge a particular duty.

The usual method of requiring the attendance of a witness is by the service of a subpoena. If the witness disobey it, he is in contempt, and subject to an attachment. Now, it is apparent, if the venire and subpoena concur in identity of person, of court and of time, there is not the less a distinction as the duty to be fulfilled. Indeed, the only identity of time was, that each duty began on the first day of the term. Here the plaintiff was directed to be present as a juror and as a witness on the same day, but neither process specified how long he might be needed in the one or other capacity. That depended upon future contingencies. When he had finished his duty as juror, he had not necessarily performed his duty as a witness, and so of the converse of this. And yet, if he had performed one duty, why might he not leave the court and return home, leaving the other unperformed? Simply because the process of the court operated on him, and called on him to discharge the other duty. If a person attends court as this party did he assumes a two-fold character, and for each is entitled to his compensation. Suppose after a person is summoned as a juror, it is ascertained that he is an important witness for the government, shall the District Attorney decline to have him subpoenaed because he has been summoned at the same term as a juror? Certainly not. If he did not attend, it would be no sufficient reason for continuing the cause, that it was supposed he would be present as a juror. The process to him as juror does not demand his attendance as a witness, and there is, in general, no method by which a person, if absent, can be compelled to attend as a witness, but by the service of a subpoena. Besides, it is no part of the duty of the District Attorney to know who is on the panel, and, in fact, he is usually ignorant of it till the meeting of the court. On the other hand, if he does attend, and his duty as juror is finished, is

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the officer of the government to watch the moment that it happens, and then serve a subpoena on him to compel his attendance as a witness? If his service in one capacity is performed, it will not be pretended but that he may be compelled to remain under the process of the court, and if he do remain, then clearly is he entitled to compensation for so doing. It is plain that the only safe course is to have the appropriate process for witnesses duly served. Again, if a juror summoned by the government has already been paid by another party for attendance as a witness at the same term, why may not the United States refuse to pay him? It would still be double pay. It is said *one* party does not pay double. True, it is another party, but the case put shows that the fact of double pay does not determine the right. It must, then, rest upon the circumstance of the party being the same. But it may be reasonably asked, for which service shall he be paid, as a juror or witness? It is true that the per diem and mileage of each is the same,—it is generally so, but not necessarily,—and if it were by law different, which should he have?

The argument which is drawn from the liability to abuse which exists in these cases is no sufficient reason for giving a construction to the statute which its language will not justify. If a flagrant case of abuse were made to appear, the court might interfere, or, if this were a questionable power, it is always within the province of the legislature to interfere and correct it.

I think, therefore, upon principle, the plaintiff is entitled to compensation in each case.

The point seems not less clear upon authority. And the example of the government is not wanting to sanction the view taken by the court.

When the courts of the United States were first created, the Circuit and District Courts were held by different judges, and at different times, though by the act of 1789, the judge

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of the District Court was one of the judges of the Circuit Court. Of late years, however, as the District judge performs a large part of the duties of the Circuit Court, the Circuit and District Court in most of the States are now required to be held at the same time and place. And yet prior to 1842, though both courts were held at the same time, it is understood it was the practice for the officers of the court to claim, and for the government to allow compensation in each court. But the act of May 18, 1842, 5 Statutes at Large 484, expressly provided that in such case no greater per diem or other allowance should be made to certain officers named, than for attendance on one court. This being the practice acquiesced in by the government, to prevent which an act of Congress was necessary, it is not unfair to presume that prior to the passage of that act, the compensation charged and allowed in each court was a legal one.

So here, I hold, for a much stronger reason, that the charge of the plaintiff is a proper one. Even the act of 1842 requires that both courts must be held at *the same time*, to exclude the officers from compensation, and it is probable, if both courts should meet on the same day, and after sitting from day to day, one of the courts should adjourn over for one or more days,—the other court sitting on,—the officers in attendance on this last court would have a right to their compensation, and thus it might happen that they would receive pay for two courts at the same term. However this may be, it is enough to say that the law of 1799 gives the compensation as well to the witness as the juror, and the law of 1842 has made no change in this respect. That both characters united in the plaintiff, in this instance, was his fortune.

Recently the Circuit Court of the United States for the Eastern District of Pennsylvania, where a case had been postponed for several days, some of the jurors residing at a distance held that they were entitled to compensation for attendance, though, in fact, they were absent from court. *Par-*

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ker v. Kempton, Wallace, jr., R. 344. And see *Hathaway v. Road*, 2 Wood. & Minot, 63.

The laws of the States provide, in general terms, not unlike the act of Congress of 1799, for the compensation of witnesses and jurors. A similar law exists in Illinois, and when the same person is a juror or witness at the same time, his right to compensation in each character, so far as I have understood, has never been questioned. Indeed, when a person attends, at the same time, in the same case, but subpoenaed by both parties, it has been usual to have the costs taxed for both services,—that is, as the witness of the plaintiff and of the defendant. On this last point, however, the practice is not uniform in the States. *Place v. Penn*, 1 Murphy N. C. R. 188; *Renfor v. Kelly*, 10 Alabama R. 338. In *Whipple v. Cumberland Cotton Co.*, 3 Story's R. 84, the court allowed the costs of a witness who had travelled a distance of more than a hundred miles from the place where the court was held, to be taxed in the cause, though he had come from another State. And this was followed in a very recent case, *Hathaway v. Road*, 2 Wood. & Minot 84.

In the case of *Willink v. Reckle*, 19 Wend. 82, the court decided that witnesses subpoenaed by the same party in three cases at the same term, were entitled to their fees in such case for going and returning, and for attendance. This is a much stronger case than that, for, if witnesses subpoenaed by the same party could receive pay in each cause, much more would a person summoned as a witness and a juror by the same party, be warranted in receiving pay in each character.

These authorities, not to multiply others, conclusively show that the courts have uniformly given a liberal construction to the law, and I think, they justify the plaintiff's claim.

Let the rule, therefore, be made absolute.

CIRCUIT COURT OF THE UNITED STATES.

OHIO—OCTOBER TERM, 1851.

CHARGE TO THE GRAND JURY.

After presenting to the jury certain violations of the laws of Congress, which ordinarily come under the consideration of the Grand Jury, Judge McLean remarked: A sense of duty requires me to call your special and serious attention to an act of Congress of the 20th of April, 1818, which is entitled "An act for the punishment of certain crimes."

The 1st section of that act provides, "That if any citizen of the United States shall, within the territory and jurisdiction thereof, accept and exercise a commission to serve a foreign prince, state, colony, district, or people, in war, by land or by sea, against any prince, state, colony, district, or people, with whom the United States are at peace, the person so offending shall be deemed guilty of a high misdemeanor, and on conviction shall be fined not more than two thousand dollars, and imprisoned not exceeding three years."

The 2d section declares, "That if any person shall, within the territory or jurisdiction of the United States, enlist or enter himself, or hire, or retain another person to enlist or

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enter himself, or go beyond the limits or jurisdiction of the United States, with intent to be enlisted or entered in the service of any foreign prince, state, colony, district, or people, as a soldier, &c., shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding one thousand dollars, and imprisoned not exceeding three years."

Sec. 6. "That if any person shall, within the territory or jurisdiction of the United States, begin or set on foot, or provide or prepare the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars, and imprisoned not more than three years."

To this section your attention is specially solicited. You will observe that the enumerated acts which constitute the offense are all in the disjunctive. To "begin" the military expedition spoken of, is an offense within the statute. To begin it, is, to do the first act, which may lead to the enterprise. The offense is consummated by any overt act which shall be a commencement of the expedition, though it should not be prosecuted. Or if an individual shall "set the expedition on foot," which is scarcely distinguishable from beginning it. To set it on foot may imply some progress beyond that of beginning it. Any combination of individuals to carry on the expedition is "setting it on foot," and the contribution of money or anything else which shall induce such combination, may be a beginning of the enterprise. "To provide the means for such an enterprise," is within the statute. To constitute this offense, the individual need not engage personally in the expedition. If he furnish the munitions of war, provisions, transportation, clothing, or any other necessities, to men engaged in the expedition, he is guilty, for he provides the means to carry on the expedition. It must be against a nation or people with whom we are at peace.

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In passing the above law, Congress has performed a high national duty. A nation, by the laws of nations, is considered a moral being, and the principle which imposes moral restraints on the conduct of an individual, applies with greater force to the actions of a nation. "Justice," says Vattel, "is the basis of society, the sure bond of all commerce. Human society, far from being an intercourse of assistance and good offices, would be no longer anything but a vast scene of robbery, if there were no respect to this virtue, which secures to every one his own." "It is still more necessary between nations than between individuals, because injustice produces more dreadful consequences in the quarrels of these powerful bodies politic, and it is still more difficult to obtain redress."

These remarks are made, and the law cited, in reference to the late military expedition against the island of Cuba. That expedition was organized in this country, and was composed, principally, of our own citizens. Its object was to subvert the government of Cuba—a part of the Spanish dominions. With the government of Spain we have a treaty of peace and amity. A foreigner was at the head of the expedition. He seems to have been a credulous and weak man. He was impetuous, but was wanting in sagacity and judgment. His melancholy fate may excite our sympathy, but his memory is loaded with the execrations of thousands. He was instrumental in corrupting the minds, and withdrawing from their allegiance, many of our youth, who have paid the penalty of their temerity and recklessness. Their conduct admits of no other mitigation than that they were misled by falsehoods. They were induced to believe that a considerable portion of the people of Cuba were in arms, with the determination to overthrow their government. Those who were instrumental in creating this delusion have an awful account to render to their country and their God.

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The invading force, instead of meeting friends, met determined enemies with arms in their hands. At every step the invaders were opposed, and it is not known that a single Cuban joined the enemy. As might have been anticipated, the career of the invaders was short and extremely disastrous. Their sufferings were almost without a parallel; and, with two or three exceptions, those of them who were not taken prisoners and executed, were sentenced to an ignominious imprisonment in Spain.

This second expedition terminated more disastrously than the first one. That was fitted out by the same leader, and the force was also raised and organized in our country, in defiance of its laws. The leaders and men were alike guilty in each, but as in the first expedition but few were killed, it created less sensation in the country than the late one. These unlawful enterprises cast a shade upon our national character, in the opinion of the civilized world. They unjustly, more or less, connect our government with the outrage, and they ascribe it to a lust for power and national aggrandizement. The chief executive, by proclamation, from time to time, warned the country of the unlawfulness of the enterprise, and of the punishment to which those engaged in it would be exposed. The executive and ministerial officers of the government were exhorted to be on the alert, to check and defeat the nefarious design. And a part of the navy was charged with the same service. But these efforts were ineffectual; in their madness and folly those who were embodied, trampled upon the laws of their country, and rushed upon their own destruction. To suppose that they could, under such circumstances, have been impelled by any justifiable motive in their own views, is to suppose them to have been laboring under a most extraordinary mental aberration.

The duty of giving effect to law devolves upon the judiciary, and you, gentlemen, for the time being, constitute an

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important part of that branch of the government. And now that the excitement growing out of the late expedition has subsided, and its fatal results are fully known, it becomes us, from the position we occupy, to take a calm, a considerate, and legal view of the circumstances which led to it, and of the acts of our own citizens. In this respect, your inquiries will be limited to the district of Ohio.

Our own history may show in what light our government has considered those opposed to us, who placed themselves beyond the limits of civilized warfare. Gen. Jackson, while engaged in the subjugation of savages in the South, captured two white persons who were banded with them, and in a great measure controlled their depredations. Arbuthnot and Ambrister were British subjects, who having been taken in arms, fighting on the side of the Indians against our armies, and within our territory, were summarily tried and summarily executed, and the Commanding General was sustained by his government. Great Britain was too well acquainted with the laws of nations, and with the justice of the punishment, to make it a subject of serious remonstrance.

Compare the acts of these unfortunate men with the invaders of Cuba. Arbuthnot and Ambrister united themselves with the weaker party, and took part in the war. They were associated with savages, but savages who, to some extent, were allowed to possess the attributes of a nation. Treaties were made with them, and they had always exercised the right of carrying on war against the whites. These men identified themselves with this people in the war, and in doing so, did not, it is believed, violate any express law of their own country. They incurred the hazards of such a war, were taken, and justly condemned.

Our citizens, in the invasion of Cuba, put at equal defiance the laws of their own country, and the laws of nations. They were covered by no flag; protected by no public opinion, governed by no general law. They placed themselves

beyond the pale of civilization, and in doing so, became pirates and outlaws. They invaded a nation who were protected from outrage and injustice by the solemn guaranty of a treaty—a treaty in which our national honor was deeply concerned. No nation could be bound by a more solemn or higher obligation than our government is bound to maintain the most friendly relations with Spain.

And the expedition was directed against an unoffending people. A people who were content with their government, and not desirous of a change. Neither in the landing of the invading army, nor in its progress through the country, was there found a traitor to the Cuban government. This is a most extraordinary fact. It could scarcely be realized by the invasion of any other country under similar circumstances. The liberating army found no one willing to be liberated. They were everywhere received as enemies. It is not known that any cruelties were perpetrated by the invaders on individuals. It is believed there were none. But their way was marked with blood—blood shed in skirmishes and in more general engagements. There never was an invasion among civilized nations, more atrocious and less excusable.

Let us suppose a similar invasion of our own country. And here it may be premised that if complaints against our government and a determination to overthrow it, in a certain quarter, afford any excuse for the combination of a foreign force against us, a strong case could be made out. But suppose an armed force, acknowledging allegiance to no government or people, should invade any part of our country with an avowed intention of overturning the government, how speedily would it meet destruction. Such an indignity and outrage would cause the blood to thrill through the veins of every American.

Gentlemen, our government must be just to ourselves, and just to other nations. A government is responsible for the

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acts of its citizens. Not, is true, in the first instance, where they commit depredations upon a friendly nation. But if such citizens are not punished or given up to the injured government for punishment, the nation to whom they owe allegiance becomes a party to the wrong. This is an acknowledged principle in the law of nations. But the duty we owe to ourselves is of the highest obligation. No free government can be sustained, which does not enforce its laws.

A deep and abiding respect for the laws, has heretofore been the glory of our country. In that consists our strength. Those who are unacquainted with the principles of our government, seem naturally to conclude it is wanting in energy and power. But they do not comprehend the secret of its strength. The majesty of the law pervades every part of the nation, and operates unseen ; but its effects are visible. It has, heretofore, required no military display of men at arms to carry it into effect. But I am concerned to say that our late history, in this respect, will not compare with the past. There is, I fear, a growing indifference to the laws. When Aaron Burr was suspected of being engaged in an enterprise against the adjacent provinces of Spain, connected, as was apprehended, with a dissolution of the Union, the country was greatly excited, and he was pursued, arrested, and indicted for treason.

Does the same deep feeling for the Union and its laws now pervade our country ?

If it shall appear from the evidence that shall be given, that any of our citizens have violated the above law, it will be your duty to indict them. Laws that remain upon our statute book should be operative, or they should be repealed. The national standard is lowered, and licentiousness is increased, by a failure to enforce the penalties of the law.

Our institutions can be sustained only on a moral basis. This is wanting in France, and they cannot maintain a free

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government. They may have the form, but the substance will be wanting. At this moment the Republic of France, as it is called, is restrained and governed by physical power. And if our government, in our external and internal affairs, shall be so managed as to destroy its moral basis, we may as well attempt to build a structure in the air, as to sustain it. I fear this great fact may not be properly appreciated. On it depends, not only the prosperity of our free institutions, but their existence.

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The rule, though general, is not universal, that more than one trial at law is required, to authorize a bill of peace.

Much depends upon the circumstances of the case.

If a trial has been full and satisfactory, and from lapse of time an acquiescence may be presumed, and, if in addition to this, a case in the Circuit Court has been reviewed and affirmed by the Supreme Court of the United States, strong ground exists for a bill of peace.

Under the 9th sec. of the Practice in Chancery Act of the State, of 1824, a title may be quieted, when it has been established.

In such a case the court cannot direct, in a second trial before a court of law, that the same evidence shall be received as was used in the first trial. In directing an issue to a court of law, this may be done.

Or, in granting a new trial, such an order may be made as a condition.

The rules of evidence, except the answer of the defendant, are the same in chancery as at law.

Mr. *Chase* for plaintiffs.

Mr. *Walker* for defendant.

OPINION OF THE COURT.

This is a bill to quiet title. In December, 1829, the plaintiffs recovered, by an action of ejectment, in this court, certain lots in the city of Cincinnati, on which a judgment was

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rendered, which judgment was affirmed, on a writ of error, by the Supreme Court, at January Term, 1833.

The bill states that the lots claimed were conveyed to the ancestor of the complainants, by John C. Symmes, on the 6th of May, 1791, and that the deed was regularly recorded. That Gen. Harmer, shortly after the deed was executed, took possession of the lots, and remained in possession until his death, in 1814. That when Gen. Wilkinson commanded the garrison at Fort Washington, he had the parade ground enlarged so as to include the lots, by which means their boundaries became obliterated and lost.

Judge Symmes did not obtain the patent for his Miami purchase until 1794. The deed to Gen. Harmer being prior to that time, it was supposed that the legal title remained in Symmes, and it was levied on and sold under an execution, as his property, to Ethan Stone.

In 1811, Gen. Harmer filed a bill in the Supreme Court of Ohio, and obtained a decree that the said Stone should release to his heirs all his pretended title. This was in 1820, Gen. Harmer having died in 1814. The heirs of Gen. Harmer, on his death, came into the possession of the premises. The release executed by Stone, under the decree of the court, described the lots as lying south of Front street, they being situated north of it.

At the death of Gen. Harmer, his heirs were minors. After they became of age, in 1828, they brought an action of ejectment in this court for the lots, and recovered possession of them, which they have ever since maintained.

The bill alleges that the defendant, who claims by descent from his father, who was one of the defendants named in the ejectment writ, has lately commenced an action of ejectment in the Superior Court of Cincinnati, which was removed by the defendants to this court.

The bill further alleges, that the boundaries of said lots, and many other facts proved in the action of ejectment, can-

not now be proved, by reason of the death of the witnesses ; and they pray that they may be quieted in their title by enjoining the defendant ; and that if the court shall be of the opinion that the defendant is entitled to another trial at law, that he may be required to receive the depositions and evidence used in the former case.

The defendant demurred, generally, to the bill.

The remedy claimed in this case may be resorted to, to suppress oppressive litigation, and prevent irreparable mischief. And an injunction may be granted to quiet the possession of an owner of land against ejectment suits, where the right of the complainant has been satisfactorily established by law. And in some cases it has been held immaterial what number of trials has been had. (2 Story's Equity, sec. 859.) This jurisdiction was formerly much questioned. Lord Cowper refused an injunction where five verdicts had been rendered for the plaintiff. But the House of Lords overruled this decision, and established the jurisdiction. 26, Com. Law Rep. 859.

The power to grant injunctions is confided to the discretion of the Court of Chancery, to be exercised in all cases, where that court shall deem it necessary, for the furtherance of justice. *Trustees of Huntington v. Nicoll*, 3 Tenn. Rep. 586. In that case there was one trial for trespass, and, under the circumstances, it was held that the court ought to quiet the title.

It has not been usual to exhibit a bill in chancery for quieting a title between two individual claimants until after several verdicts at law. But it seems not to have been held that any precise number of verdicts at law before a bill of peace can be sustained. The better rule would seem to be, that the title at law has been fully and fairly established by one or more trials. (2 Term Rep. 601.)

In *Leighton v. Sir Edward Leighton*, 1 Peer Wms. 672, there were two verdicts for the defendant, and afterwards two

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for the plaintiff, and the court perpetually enjoined further litigation, quieting the plaintiff in his possession. By a note in that case it is said, that in a cause much litigated, the defendant shall not be concluded by one verdict. That case was affirmed, on an appeal to the House of Lords. (2 Brown's Par. Cases 21.)

After the right to real estate has been satisfactorily established at law, equity will quiet the title against further disturbance. It is immaterial what number of trials have been had, whether two or more, so that the right be satisfactorily established. *Marsh v. Rees*, 10 Ohio 347. In *Wilber v. Smealon*, 1 Bro. ch. R. 573, the demurrer was allowed, as the right had not been established at law. In that case the Lord Chancellor said, if after trial, the party should begin again, and commit new trespasses, it is possible a case might be made to induce this court to interfere by way of injunction, but merely where one party claims, and another denies the right, it is impossible to entertain the bill.

On the part of the defendants, it was contended that the general rule on this subject required two or more trials at law, before chancery would restrain the defendant from prosecuting an action at law, to recover the possession of the premises; and the following authorities were read in support of the position assumed: French's Precedents in Chan. 262; 1 Brown's Par. Cases 266; 2 do. 217; 2 Atk. 48; 3 John. Rep. 586, 590; 1 Wms. 672.

In the case before us the facts have been tried once only by a jury; but exceptions were taken as to the admission of the facts in evidence before the jury, and the principles of law which belong to the case have been twice considered and decided; first, in the Circuit Court, and then in the Supreme Court. This, in such a case, is entitled to consideration.

Long continued possession is also a matter not to be disregarded in the case. From lapse of time, a presumed acquiescence in the first decision may be drawn. And in ad-

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dition to the above consideration, all the points which could be raised, were made and deliberately considered in the Circuit Court, and also in the Supreme Court, we are inclined to think might afford ground on which to quiet the title. But there is another ground on which this proceeding may be sustained, and which has not been advocated in the argument.

The 9th sec. of the Practice in Chancery Act of 1824, of this State, it is provided, "That any person having both the legal title to, and possession of land, may institute a writ against any other person setting up a claim thereto; and if the complainant shall establish his title to such land, the defendant shall be decreed to release his claim thereto, and to pay the complainant his costs; unless the defendant shall, by his answer, disclaim all title to such lands, and offer to give such release to the complainant, in which case the complainant shall pay to the defendant his costs, except for special reasons appearing, the court shall otherwise decree."

In the case of *Clark et al. v. Smith*, 13 Peters 20, under an act of Kentucky of 1796, which contained the same provisions as are in the Ohio act, the Supreme Court held it afforded ground of relief. They say, "the State legislatures have no authority to prescribe the forms and modes of proceeding in courts of the United States; but having created a right, and at the same time, prescribed a remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the chancery side of the federal courts, no reason exists why it should not be pursued in the same form as in the State courts."

Under the above statute it is not perceived why relief may not be given to the complainants, if they shall show themselves entitled to it. It is a new right so far as the form of the action is concerned, which can be enforced only by a court of chancery. And in such a case the Supreme Court have held relief may be given.

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In regard to the alternative prayer of the bill, to require the court of law, if the injunction shall not be granted, to receive the evidence in behalf of the complainants that was used on the trial of the former ejectment, I am inclined to doubt the power of the court.

Where chancery directs an issue at law, such an order may be made. But can the Chancellor in this manner control the judgment of a court of law. In directing or granting a new trial, this may be done as a condition of granting the motion. But the rule of law, in regard to the admission of evidence, is the same at law as in chancery. It is true, the answer of the defendant, responsive to the bill, is evidence which must be contradicted, but in every other respect the rule in both courts is the same.

The demurrer is overruled, and leave is given to the defendant to answer the bill.

DOE EX. DEM. LYNE STARLING v. J. HAWKS.

Where from the facts of the case a conveyance of land appears to be only colorable, with the view to give jurisdiction to the courts of the United States, the writ will be dismissed, on motion or on a plea.

If the suit is to be prosecuted under the direction of the grantor, and at his expense, and where he has the option within a stipulated time to take back the land, on returning the bond; and where a similar right is given to the grantee, it is sufficient to show that the object of the conveyance was, to give jurisdiction to the Circuit Court of the United States, and for the benefit of the grantor.

Mr. Backus for the plaintiff.

Messrs. Swan & Andrews for defendants.

OPINION OF THE COURT.

A motion is made to dismiss this cause for want of jurisdiction, on the ground that the land claimed, was conveyed

to the lessor of the plaintiff by Sullivant, to give jurisdiction to this court to prosecute a suit for the benefit of the grantor.

Mr. Backus stated, as counsel, which was admitted by the other party, that there were many cases involving the title to land to a large amount, pending in Champaign county. That from the trial of one of them he, as counsel, became convinced, from the local interest felt, and consequent influence on the juries, a fair trial could not be had in that county; and that he advised the conveyance made by Mr. Starling to the lessor of the plaintiff, for the consideration of twenty thousand dollars, in order that suits might be prosecuted to settle the title at the expense of the grantor. And it was agreed that if, at the end of five years, the grantee should prefer, he had the privilege to re-convey the land; that if sales could be made, the proceeds should be paid over to the grantor, in payment for the lands. And that Sullivant executed deeds of general warranty for the lands sold.

The following correspondence took place in making the arrangement. In a letter dated 5th of August, 1848, after complaining of the influence brought to bear on the jury, on one of the trials, for a part of the land, which caused a verdict against Sullivant, Mr. Backus states, "Sullivant and myself now propose to sell the tracts to you. Our title you are acquainted with, and as to the value of the land you are as able to judge as we. It has been estimated at various amounts from ten to sixty thousand dollars. We will sell it to you for twenty thousand dollars, payable in five years, with interest, upon the condition, that is, if at the expiration of five years, you should make default in the payment of the purchase money, the land shall be re-conveyed, and your note given up. In other words, the condition shall not operate as a mortgage in favor of either party; and if at the end of the time, you should not choose, or it should be incon-

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venient to make the payment, and take the land, we cannot compel you to do so. But upon re-conveyance we shall be compelled to release you from the payment of the purchase money. We, on the other side, should you be allowed to force us to look to a sale of the land for the purchase money, or to yourself upon your note, being as you are a citizen of New York, you would be more favorably situated, so far as regards litigation, than we, because you can bring your suits in the United States courts, and be beyond the local prejudice and feelings of the people of the county where the land lies."

Another letter was dated 22d Aug. 1848, in which Mr. Starling says: "I am pleased with your proposition to sell me the Lee lands in Champaign, and I accept your proposition without hesitation, and enclose you my note for the purchase money. The legal title is in William; let him execute the proper conveyances, and deliver them to you. Do you place them on record, and prosecute the suits for the recovery diligently in the manner you shall deem conducive to my interest."

On the 3d September, 1851, Mr. Starling writes: "I promptly accepted your offer to purchase the Lee lands upon the terms you proposed. I intended to have enclosed you a note for the purchase money, but believe I neglected to do it, and I now enclose it, dated August 22d, which is about the time I wrote to you."

Under the above circumstances the conveyance was executed, and suits, for the recovery of the lands, were commenced.

A conveyance of land may be made with the express view of giving jurisdiction to the courts of the United States, and if it be an absolute, bona fide conveyance, it is good. This is the right of every citizen. A person may change his citizenship for this purpose; and the motive with which the conveyance was executed, or the change of citizenship was

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made, though avowed, if both were done in good faith, it constitutes no objection to the exercise of jurisdiction.

In a conveyance of land for this purpose, the only question is, is it an absolute conveyance without conditions, that it shall enure to the benefit of the grantor. If it be colorable only, it is a fraud on the law, and jurisdiction in the federal court is not sustainable.

The deed is absolute on its face. The condition, whether expressed in the deed or out of it, if inoperative as to a transfer of jurisdiction, would not destroy the validity of the deed, only for the purpose of giving jurisdiction to this court.

The contract stipulates that the agreement should not operate as a mortgage, but suppose a mortgage on the land had been given to secure the payment of the consideration. The conveyance would have been absolute, and the jurisdiction undoubted. But this is not the character of the conveyance. The grantor had the option to rescind the contract at the end of five years. He was not bound to do so, but it was a right secured to him. This shows the nature of the transaction, and the purpose for which it was entered into. In addition to this the suits were to be prosecuted at the expense of the grantor, which authorizes the inference that the suits were to be brought for his benefit. Starling was not obliged to take the land, but had the right to relinquish it, on which the grantor was bound to deliver up his obligation. This shows the conveyance was not intended to be absolute.

There is no immorality in this. It was simply a device and a contrivance to change the jurisdiction, with a view of obtaining a trial free from local prejudices. This, indeed, is a laudable motive, and there can be no objection to it, except that the law, and the policy of the law, are against it. The case of *McDonald v. Smally*, 1 Peters 623 was different from this, in several important particulars. The title was absolute upon its face, and an adequate consideration was expressed in the deed. There was no condition for a re-convey-

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ance, no promise to aid in the prosecution of the suit, nor that the grantor would pay the expense. Upon the whole, we are satisfied, from the facts of this case, that the conveyance was colorable only, and with the view to give jurisdiction to this court ; the suit is, therefore, dismissed.

DOE EX. DEM. DUNLAP ET AL. V. PYLE ET AL.

SAME V. DAKIN ET AL.

In 1812 a citizen of Kentucky made his will, in which he said, "I give and bequeath every part of my estate, of every kind whatsoever, to be equally divided (by sale or otherwise, as may be deemed best), between my loving wife and my children, not heretofore named, and their heirs forever, having particular regard to the education of my children, not as yet educated." His wife, two of his sons, and son-in-law were named in the will as executors. The wife only took out letters testamentary.

The above will did not authorize the executors to divide or sell the real property of the estate in Ohio.

Especially it did not authorize the husband of the widow, to whom she was afterwards married, to sell and convey these lands as agent.

The sale and also the deeds executed by him are void.

The devisees being non-residents, the statute of limitations does not run against them, except against John Boyce, who was within the State when the land was sold.

A right which subsequently fell to him, on the death of a brother and sister, is not barred.

Messrs. Robertson, Probasco & Mickle for plaintiffs.

Messrs. Harlan & Corwin for defendants.

OPINION OF THE COURT.

This case was submitted to the court at the last term, but not receiving the argument on both sides, I did not examine the papers until the present term.

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Major William Boyce, the ancestor of the plaintiffs, and under whose will they claim the land in controversy, died in Fayette county, Kentucky, early in 1812. He was, at his death, seized of three surveys of land in the State of Ohio, which he devised as follows : After naming his elder children who had received from him their just proportion of his estate, he declares, " As my estate lies in various parts of the world, and of various descriptions of property, so that I cannot make equal distributions in my will among the rest of my children, who have as yet not received their patrimony, by pointing out to each their kinds of property, in order to do equal justice to them and my loving wife, I give and bequeath every part of my estate, of every kind whatsoever, to be equally divided (by sale or otherwise, as may seem best), between my loving wife and my children, not heretofore named, and their heirs forever, having particular regard to the education of my children, not as yet educated."

" I constitute, ordain, and appoint, my loving wife Elizabeth, my executrix, my sons, John and William, and Thomas Wrenn, my son-in-law, the whole and sole executors of this my last will and testament."

The will was proved in February, 1812, and on the 11th of August ensuing, Elizabeth Boyce, the executrix, took the oath, and gave security for the faithful performance of her duties, in the sum of sixteen thousand dollars. No other one of the executors named was qualified to act as such.

About seven months after the death of the testator, his widow was married to Gerard McKinney, who took upon himself the settlement of the estate of Boyce, and sold the lands now in controversy, under which sales the defendants claim.

The principle questions which arise in the case, are :

1. Did the will confer a power on the executors to sell the land in controversy.
2. If it did, has the power been properly executed ?

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3. What effect has the statute of limitations upon the rights claimed by the plaintiffs?

It is intimated in the argument that the plaintiffs must claim as heirs, and not as devisees. And so claiming, that their legal interests are in common with the other children of the testator. That the plaintiffs, not being vested with the legal estate of the lands claimed by them, have an exclusive right only to the proceeds after they shall be sold. This could not have been the intention of the testator. He bequeathed every part of his estate, of every kind, to be equally divided, by sale or otherwise, as may seem best, &c. The lands were given to the devisees, to be divided in equal parts among them; but if it should be deemed best to sell them, the proceeds to be divided equally. The title to these lands was vested in the devisees.

Did the testator require these lands to be sold? He required them to be equally divided or sold, "as may seem best." Now, who was to determine this matter? The executors? That is the argument of the defendants. It must be observed that the lands are not given in trust to the executors to be sold. This is the usual course, when a testator authorizes a sale of his real estate for distribution among his devisees, or to pay debts. There is no power given to the executors in the will to sell these lands, unless it can be inferred from the clause which authorizes a division of them, by sale or otherwise, "as may seem best." Could the executors have made legal partition of these lands among the infant heirs? A partition which would have bound them when they were of age. Such a duty is not ordinarily performed by executors. It in fact is never done, and cannot be done by them, unless the power to do so be expressly given in the will. There is no such express power given in this will. Can it be inferred from the above clause?

The defendants argue from the necessity of selling the land to educate and support the devisees, all of whom, ex-

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cept two, were under ten years of age, the power to sell by the executors, must be inferred, as within the intention of the testator. This argument rests on an assumption not sustained by the facts. The testator bequeathed the whole of his property to the devisees. Not only these lands, but his entire estate, which he says "lies in various parts of the world, and consists of various descriptions of property." That he had a large personal property may fairly be presumed, from the amount of security required to be given by the executrix.

If the executors could not make a legal partition of the lands, could they sell them? "as may seem best," they may be divided or sold. Now, is there any distinction in regard to the power of the executors, in the one alternative or the other. They are equally within the provisions of the will, and it would seem, if there be no power to partition, in the executors, there can be no power to sell.

How are the rights of infants to be protected? Not by executors or administrators, but through the agency of guardians who are appointed by the courts, and who are required to give bonds, and whose acts are subject to the supervision and control of the courts.

Suppose the sale of these lands had been necessary for the support of the family, could that have influenced the construction of the will? We suppose not. On application to the court in the county where the lands are situated, by the guardian of the infants, showing that the sale was necessary for their maintenance, a sale would have been ordered, and a legal title made, in this mode, to the purchasers. To whom, then, may we presume, the testator referred in saying that the lands should be divided or sold, "as may be deemed best?" The lands belonged to the heirs, and could not be made subject to the debts of the estate, unless there had been a deficiency in the personal assets. In that event, and in no other, could the lands, ordinarily, come under the con-

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trol of the executors, by virtue of an order of court. The testator must have referred to those who should have the legal guardianship of the infants, and their property, and who were responsible to them, and acting under legal restraints. Or he must have referred to the infants when they should be capable of acting for themselves. He could not have referred to the executors who had no agency over the lands by the will. Their interests, as the result has most unfortunately shown, were antagonist to those of the infants. The reference was to those who had the power to partition the lands, or sell them, either by their own acts, or through the agency of the proper tribunal. Now, the executors under the will had no power to make partition of the lands, nor to sell them.

It is said if the executrix could not sell these lands, she had nothing to do. The personal property was held in trust by her, to pay debts, &c. With the real estate she had nothing to do.

Suppose the power to sell was given to the executors, has that power been properly exercised? The husband of the executrix was rightfully associated with his wife in the administration of the estate. But could he act alone? Could he act as the agent of the executrix, without her concurrence? If she was authorized to sell the lands, or divide them among the heirs "as might seem best," it was a special trust and confidence, which she only could discharge. She could substitute no agency to determine whether the lands should be divided or sold. Her own judgment was to be exercised on the subject, being vested with the power to decide this matter by the will.

The conveyances made to the purchasers are not among the papers. But it is proved that the sale was made, and also the conveyances, by McKinney. It is satisfactorily shown that at the time the deeds were executed, the executrix was in Kentucky, and the deeds were executed in Ohio. The

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name of the executrix is affixed by her husband, as agent. This is illegal. He could neither contract to sell the lands, nor convey them as her agent.

If, then, the power to sell were unquestionable, it has not been properly exercised. McKinney, by his marriage, had no more power to execute the trust than a stranger. Nothing short of a signing and a due acknowledgment by the executrix, could divest the title of the heirs.

So far as the individual interest of Mrs. McKinney was concerned in the lands, she had a right to sell and convey them. And a deed duly executed, would have conveyed a title to that extent.

What effect has the statute of limitations on the rights of the devisees?

It is admitted by their counsel, that John Boyce, who was in Ohio at the time the deeds for the lands were executed, is barred by the statute. He is dead, but his heirs cannot claim by reason of the bar against their ancestor. But the residence of the other devisees is shown to have been in Kentucky, and there is no proof that any of them have been in Ohio. They must be considered, then, as non-residents, and the statute must be applied to them in that relation.

At the time this suit was commenced, the limitation was twenty-one years. By the statute of the 1st of April, 1846, the saving of non-residence was repealed. And it is contended that by this repeal the rights of the devisees must stand, as though there had been no saving in behalf of non-residents.

Some countenance is given to this argument by the decisions in the cases of the *Lessee of Whitney et al. v. Webb & Westerhaven*, 10 Ohio Rep. 513; and in *Ridley et al. v. Hetman et al.*, same Vol. 524; in which the court say, "the death of a person while laboring under disability, is entirely unprovided for." "The only alternative then to which we can cling, is to say that such person stands upon the same foot-

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ing as residents of the State, and that the lapse of twenty years, from the time the cause of action accrued, will be a bar to the assertion of the right." But these decisions were explained in the case of *Cary's adm'rs v. Robinson's adm'rs*, 13 Ohio 181. By that decision the statute begins to run against the heirs of a deceased non-resident, from the time of his death.

The proviso in the act of 1846 embraces the case of the devisees. The statute after declaring that the disability of non-residence shall not exist, so far as relates to the action of ejectment, provides, that all persons whose cause of action had accrued, at the date of the statute, their right to sue should be extended to the 4th of July, 1847. The actions under consideration were brought in 1846, within the limitation; and no bar exists, except as to the right of John Boyce, under the will. But his interest, which descended to him on the death of Daniel and Caroline, his brother and sister, is not barred.

This being an action at law, we can only look to the legal title. If there be any equitable circumstances arising out of the application of the money for which the lands were sold, or on other grounds, they cannot be considered in this case.

The plaintiffs are entitled to recover all their original rights under the will, except John Boyce's heirs, and the plaintiffs are entitled to recover the rights descended to them by the deaths of their co-heirs.

Judgment accordingly.

JOSEPH H. PULTE, M. D. v. HENRY W. DERBY, ET AL.

Where A, the author of a work in manuscript, contracts with B, a publisher, in writing, but not under seal, or attestation, or acknowledgment, that he may publish a first edition of 1,000 copies, paying A fifteen cents for each copy sold; and if a second edition should be called for, A would revise and correct the

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first edition, and B should stereotype it, and might print as many copies as he could sell, paying A twenty cents for each copy sold ; and B takes out the copyright in his own name, with the knowledge and consent of A, and the first edition being exhausted, stereotypes the corrected manuscript of the second edition, but only prints 1,500 copies of the first impression, and when these are sold, proceeds to print more, called a third edition, accounting to A according to the contract ; and then sells the plates to C, in another State, to account to B on the same terms ; and A thereupon revises a third edition, and causes it to be stereotyped and printed, and takes out a copyright in his own name ; and then seeks an injunction against B and C, who file their cross bill against A, praying an injunction against him : Held,

That until a copyright has been secured, A may license by parol the publication of his manuscript ; and if B takes the copyright in his own name, with the knowledge and acquiescence of A, he is the lawful owner of the copyright, subject to the condition of accounting to A pursuant to the contract.

That B cannot transfer his copyright to C, but may sell the plates and authorize C to publish, still accounting to A, pursuant to the contract, and not diminishing the sales thereby.

That B is bound to keep the market supplied, and may not refuse to print if he can sell.

That B was not limited to the number of copies which he might strike off at the first impression of the second edition, but might print any number he could sell, as they should be wanted, during the existence of the copyright.

That A had no right to print an edition for himself, and take out a copyright, so long as B complied with his contract.

That in the present case the court has not jurisdiction to grant an injunction either upon the bill or cross bill.

Messrs. Nesmith & Pugh, and Morris, Tilden & Rairden
for complainant.

Messrs. Walker & Keller, and Gholson & Miner for defendants.

This was an application for an injunction on bill and cross bill. The facts sufficiently appear in the opinion of the court.

OPINION OF THE COURT.

This is a controversy arising out of the following contract :
“ This agreement, entered into this 16th day of July, 1850,
between Dr. J. H. Pulte of the first part, and H. W. Derby

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& Co. of the second part, Witnesseth : That the said Dr. J. H. Pulte does hereby agree to give unto the said H. W. Derby & Co. the exclusive right to print and publish an edition of one thousand copies of a work to be written by the said Dr. J. H. Pulte of the first part, entitled, ' Homœopathic Domestic Physician.' In consideration whereof, the said H. W. Derby & Co. agree to print and publish an edition above mentioned (one thousand copies,) at their own cost and expense, and pay the said Dr. J. H. Pulte the sum of fifteen cents each for all and every copy sold. It is further agreed between the said parties that if the said Derby & Co. find a second edition called for, the said Pulte is to revise and correct a copy of the first edition ready for the press, which the said Derby & Co. agree to have stereotyped at their own cost, having the exclusive use and control of the plates, printing as many copies as they can sell, paying to said Pulte the sum of twenty cents for each and every copy sold ; settlement to be made semi-annually from the day of publication, on their note at four months from the date of settlement.

(Signed,)

J. H. PULTE,

H. W. DERBY & Co."

The first edition of one thousand copies was published and sold. A second edition being called for, stereotype plates were prepared, and the first edition being revised and corrected by the author, a second edition of fifteen hundred copies was printed ; and subsequently two thousand copies in addition were published, which was called in the title page the third edition. The plates were then transferred to A. S. Barnes & Co., of New York, under a contract to publish and account to the defendants on the same terms as the contract between the complainant and defendants ; and the complainant alleges that the third edition was contrary to his wishes and desires, and in fraud of his rights. And an injunction is prayed against the defendants, to prevent them from further printing, publishing, or selling said third edition.

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The defendants have filed a cross bill, alleging that the copy-right is vested in them; and they pray that the complainant may be enjoined from publishing the book, as he is about to do.

It is first objected by the counsel for the complainant, that although the contract between the parties is in writing, there is no seal annexed, which is necessary, under the statute, to transfer a copyright.

Whether a seal is necessary to transfer a copyright, it is not necessary to inquire. The agreement between the parties does not purport to convey the copyright. At the time it was entered into no copyright had been secured; and there is no provision in the agreement, by whom it was to be acquired in future. The contract embraced only the printing and publication of the work, on the terms stated. It gave the defendants the exclusive right to print and publish an edition of one thousand copies; and should a second edition be called for, the complainant was to revise and correct the first one, and the defendants were to prepare stereotype plates, and to print as many copies, on the terms stated, as "they can sell."

We must look out of the contract, to the acts of the parties, in regard to the copyright. And these facts must, necessarily, have a strong bearing upon the contract. It will tend to show how it was understood and construed by the parties to it.

It may be observed that in making a mere contract for printing and publishing a work, it is not usual to say any thing about the copyright. That is ordinarily retained by the author, unless there be an agreement or understanding, that the name of the publisher shall be used for that purpose. We must then look at the book itself, and to the appropriate records, to see in whom the copyright is vested. The evidence of this right must appear on the second page of the book published, it must be entered in the records of the Clerk of

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the District Court of the United States, and one of the copies must be deposited in the Department of State of the United States, the Smithsonian Institute, and the Congressional Library. Until these things are done, the copyright is not perfect; although, by taking the incipient step, a right is acquired, which chancery will protect, until the other acts may be done.

When the agreement was entered into, the complainant had no copyright to convey. He had a right to his manuscript, which the statute protects, and the property in which would be protected at common law. The right to publish this manuscript, which was all that the complainant could give, was provided for in the agreement. It was the interest of both parties to have the copyright secured. Without this, the first publication of it would have abandoned it to the public, and consequently, it could have been of no more value to either party than to any other publishers or authors, who might choose to revise and republish it. The defendants, it appears, secured to themselves the copyright. And the evidence of that right was published on the second page of the book, which was under the eye of the complainant. He, therefore, sanctioned it.

Now, this fact goes strongly to show that the contract was intended to operate, as long as the defendants, in the language of the agreement, could "sell the copies of the book." If such were not the understanding of the parties, it is reasonable to suppose that there would have been a restriction to the exercise of this right, in the contract. The counsel for the complainant contend, that a restriction does appear upon the face of the agreement. And this is found, it is said, in the provisions made for the publication of the first and second editions.

The first edition was limited to one thousand copies. And should a second edition be called for, plates were to be provided by the defendants, and they were authorized to "print

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as many copies as they can sell." Does this limit the second edition to the number of copies that may be struck off at one impression? Such a supposition is contrary to the words of the agreement. The advantage of stereotype plates to the publishers is to enable them to strike off additional copies without delay, and with little increase of expense, as they shall be called for. This is known to all publishers and authors, and this was provided for in the agreement. The defendants were authorized to "print as many copies as they can sell." Now, how are they to ascertain the number of copies they can sell, until the stock on hand shall be exhausted, or nearly exhausted, and a demand is made for more? They are no more able to ascertain this important fact on the publication of the second edition, than on the publication of the first one. The fact can only be known in the progress of the sale, and this shows that the defendants were not to be limited to the publication of the second edition, if they could sell more than happened to be published on that occasion. And it also shows the propriety of preparing the stereotype plates.

The contract seems to be susceptible of no other interpretation. The words authorizing the defendants to print as many copies as they can sell, must be stricken out of the contract, to give to it a different construction. Effect must be given to every part of the contract, if one part be not repugnant to another. There is no repugnancy in any part of the contract to the above provision. On the contrary, it harmonizes with every part of the agreement, and especially with the acts of the parties, in having the copyright vested in the defendants, and with the preparation of the plates. Plates, it is believed, are rarely, if ever used, when only one edition or impression of a work is contemplated; they are now uniformly used when a continued and an increasing demand is anticipated.

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To this view it is objected that there is no provision in the agreement for the third edition. There is only a provision that the defendants may print as many copies as they can sell ; and the mere fact of inserting in the title page in the third impression, the " third edition," cannot cut off the defendants from the right expressly given in the agreement. In a Court of Chancery the substance of a thing is more regarded than the form. Whether the defendants stated in the title page the third impression, or the third edition, is immaterial. The only objection perceived to the title page is, that the third edition purports to have been revised and corrected by the author. This applies to the second edition, and not to the third. But it is supposed to have been an inadvertence, in copying the title-page of the second edition. It is clear, this could not have been inserted with a view to injure the complainant.

An objection is made to the second part of the agreement, that there is no consideration ; that the defendants were not bound to publish a second edition, except at their discretion.

This objection comes somewhat late, after the second and third editions are published ; and especially after the complainant revised and corrected the first edition, for the second, which, by the agreement, he was bound to do. He made no objection at the time to this part of the contract, but enables the defendants to carry it out, and he realizes all the advantages secured by his contract, from the second edition. Is it not now too late to raise the objection ?

But, is there a want of mutuality in the contract ? If Derby & Co. find a second edition called for, they are bound to prepare the plates and publish a second edition. Now, if a second edition was called for, which is a fact susceptible of proof, could the defendants, in the exercise of their discretion, refuse to publish ? Such a ground would be in opposition to the spirit of the contract, and it is supposed that a

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Court of Chancery, looking at the whole contract, would have compelled them to publish. The discretion vested in the defendants was not an arbitrary one, but a discretion to be governed by facts, and on the establishment of the facts the right of the complainant should be enforced.

In regard to the cross bill filed by the defendants, charging that the copyright of this work is in them, and praying that the complainant may be enjoined from publishing a revised edition of the work, it is proper to remark, that although the legal title to the copyright is in the defendants, I can only consider it in them for the purposes of the contract. The right covers their interest and protects it, so long as they shall be engaged in the publication and sale of the work. Beyond this, they are not considered as having the right. They can not transfer it. They have no power to assign the copyright, nor to publish the work except upon the terms of the contract; nor has the complainant the right to publish the work, in disregard of the contract. In this respect the parties are bound to each other, and the contract, it is considered, covers the entire printing and publishing of the work.

This controversy has, no doubt, arisen from an honest conviction of their rights, under the contract, by the respective parties. The principal cause of the controversy, the necessary multiplication of the copies of the work, cannot be otherwise than gratifying to the complainant. He has given to the country a professional work, which, for the time it has been published, has received an extraordinary degree of public favor; and this is always considered as no equivocal evidence of merit. This, to an author, is far more appreciable than a consideration of dollars and cents.

In the contract, no express provision is made for the revision of the work, beyond the second edition. But the interest of both parties is concerned in increasing the value of the book, by the revisions and additions of the author. This will increase the demand for it, and add to the profit of the pub-

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lishers. It will also increase the reputation of the complainant as a medical writer. Seeing that the interest of both parties lie in the same direction, I recommend, that as the value of the work shall be increased, by the contributions of the complainant, the defendants shall add to his allowance, per copy, such sum as may be reasonable and just.

By the act of 15th of February, 1819, it is provided, "That the Circuit Courts shall have original cognizance, as well in equity as at law, of all actions, suits, controversies, and cases arising under any law of the United States, granting or confirming to authors or inventors the exclusive right to their respective writings, inventions, and discoveries," etc.

Does the question in this case arise under the copyright law? In the view above taken, the controversy arises out of the contract. The authorship of the complainant is not controverted, nor is it doubted that the copyright is vested in the defendants. There is no question, then, which can be said to arise under the act of Congress. On the construction of the contract alone, the rights of the parties depend. And in such a case, I am inclined to think that the Circuit Court cannot exercise jurisdiction.

In the case of *Wilson v. Sandford*, 10 Howard 99, the court held that the seventeenth section of the act of 1836, gives the right of appeal to the Supreme Court, when the sum in dispute is below two thousand dollars, "in all actions, suits, controversies, or cases arising under the law of the United States, granting or confirming to inventors the exclusive right to their inventions or discoveries," provided the court below shall deem it reasonable to allow the appeal. But, a bill filed on the equity side of the court to set aside an assignment of the patent right, upon the ground that the assignee had not complied with the terms of the contract, is not one of the enumerated cases.

In the case of *Wilson v. Stolley*, at Chambers, where a question somewhat similar was presented, I stated that where the

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controversy grew out of the license or contract, the Circuit Court had no jurisdiction. In that case, however, Stolley having forfeited his contract by refusing to make the payments required, it was held that Wilson's right under the patent was a ground of jurisdiction. And I find that the view then taken is sustained in a very late case of *Warwick v. Cooper*, 3 English Law and Equity 233.

The injunction is refused.

CHARLES J. ROGERS v. THE CITY OF CINCINNATI.

Jurisdiction is taken of a case in the Circuit Court of the United States, from the citizenship of the parties ; but unless the bill states a case for relief, it cannot be given.

To regulate commerce among the States, is a power exclusively vested in Congress.

The courts of the United States and the courts of the States exercise their powers independently, except in special cases, where the supervision is vested in the Supreme Court of the United States.

The courts of the United States cannot enjoin a suit in a State court.

But if this could be done, an injunction could not be issued where there is an adequate remedy at law.

If a city ordinance be in conflict with the commercial regulation by Congress, the defense may be made in the State court, where the suit is pending, and if the decision be against the regulation, an appeal may be taken to the highest court in the State ; and thence, by a writ of error, to the Supreme Court of the United States.

A threat to commence such a suit in a State court, would not be ground for an injunction in the Circuit Court. The mischief threatened must be irreparable at law. A suit at law, which affords an adequate defense, is not such a case.

Messrs. *Walker & Kebler*, and *M. F. Force*, counsel for the complainants.

Messrs. *E. A. Ferguson*, and *T. A. Logan*, City Solicitors, counsel for the defendants.

OPINION OF THE COURT.

This is a bill for an injunction. It represents that the complainants are citizens, one of New York, the other of Pennsylvania; that they have constructed a vessel called the "Floating Palace," designed to be used, generally, in the navigable waters of the United States, as an amphitheatre or circus, for the exhibition of equestrian performances, to which it is now applied; that this vessel has been regularly enrolled at the port of Cincinnati, pursuant to the Act of Congress, the certificate whereof is dated the 20th May, 1852; that on the same day the vessel was licensed, pursuant to the Act of Congress, to carry on the coasting trade for one year, for the purpose of the exhibitions aforesaid; that said vessel is moored at the public landing of Cincinnati, and used for the exhibitions aforesaid, but is not within the limits of said city.

And the complainants allege that the city of Cincinnati has commenced a suit against them for making such exhibitions, without any license, contrary to the ordinance, as is alleged, of said city. And praying that the said city may be restrained by injunction from a further prosecution of said suit, until a final hearing in this case. That there is no relief at law, &c.

Jurisdiction in this case may be taken, from the citizenship of the parties; but the relief cannot be given as prayed, unless the facts stated in the bill authorize it. That the exclusive power to regulate commerce among the States, is vested in Congress, in my judgment, is not now a debatable question. Nor that all acts of any State which obstruct such regulations, are void. But the commercial power is not involved, unless the bill makes a case for relief in chancery.

That the courts of the United States, in common with the State courts, will enjoin against any threatened injury, where

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the law gives no adequate remedy, is undoubted. And this principle is applied to private nuisances. But, in every such case, it must be made clear to the court, that the mischief threatened will be irremediable at law.

The ground stated in the bill for an injunction in this case is, that a suit has been commenced against the complainants for a violation of a city ordinance, in exhibiting their circus without a license from the city; and that the complainants having enrolled their vessel, and taken out a coasting license under the Act of Congress, have a right to exhibit their circus, without taking a license from the city. If this were admitted, does it follow, that the State tribunal should be enjoined?

There are two objections to the mode of proceeding suggested. 1. The Circuit Court of the United States has no power to enjoin a procedure in a State court. 2. There is a remedy at law.

The Federal and State courts, in many cases, exercise a concurrent jurisdiction; and in all such cases, the pendency of a suit in the State or Federal court may be pleaded in abatement to an action brought for the same cause in any other court. In every respect, except where the acts of Congress have made special provision, the courts of the State, and of the United States, are as distinct and independent in the exercise of their powers, as the courts of two separate and independent nations. No supervisory power can be exercised by a Federal court over a State court, unless under some special provision. The exceptions are in behalf of citizens of other States, who may remove a suit from the State court to the Circuit Court of the United States, by application at the first term, and giving bail, &c. And also "where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exer-

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CIRCUIT COURT OF THE UNITED STATES.

MICHIGAN—JUNE TERM, 1852.

JOHN R. McLEOD v. JEREMIAH W. DUNCAN.

Where a case has been certified from a State court to the Circuit Court, under the 12th section of the Judiciary Act of 1789, the case stands as though the suit had been originally commenced in the Circuit Court.

An injunction allowed before the filing of the bill, in the State court, necessarily falls, as the Circuit Court cannot punish for a contempt of that court.

A motion for an attachment, for a violation of the injunction in the State court, cannot be allowed; nor a motion to dissolve the injunction, as it necessarily falls by the removal of the case.

A motion for an injunction may be heard on the face of the bill, in this court, the same as if it had been originally filed here.

Mr. *Backus* for plaintiff.

Messrs. *Howard & Chickering* for defendant.

OPINION OF THE COURT.

This case was certified from the State court, under the act of Congress. It was a bill in chancery on which an injunction had been allowed and issued. A motion was made to dissolve the injunction by the defendant; and also a motion by the plaintiff, for an attachment against the defendant, for a violation of the injunction.

The 12th sec. of the Judiciary Act of 1789, under which this case has been brought from the State court, provides, "that if a suit be commenced in any State court against an alien, or by a citizen of the State in which the suit is brought against a citizen of another State, and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the court; and the defendant shall, at the time of entering his appearance in such State court, file a petition for the removal of the cause for trial into the next Circuit Court, to be held in the district where the suit is pending, &c., and offer good and sufficient security for his entering in such court, on the first day of its session, copies of said process against him, and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein, it shall then be the duty of the State court to accept the surety, and proceed no further in the cause, and any bail that may have been originally taken shall be discharged, and the said copies being entered as aforesaid, in such court of the United States, the cause shall there proceed in the same manner, as if it had been brought there by original process. And any attachment of the goods or estate of the defendant by the original process shall hold the goods or estate so attached to answer the final judgment in the same manner as by the laws of such State, they would have been holden to answer final judgment, had it been rendered by the court in which the suit was commenced."

This, I presume, is the first case removed from a State court, where an injunction had been issued by the State court, and motions similar to those now submitted have been made in the Circuit Court. At least no reported case has been cited, and we have no recollection of such a case.

In the Circuit Court, a case thus removed from the State court, the law seems to have contemplated no other process as having been issued, except the original process which

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brought the defendant into court. The attachment provided for, is in reference to the mode of original process in a suit, through which an appearance of the defendant is procured. The property attached, is to remain bound, the same as if the cause had been continued in the State court.

It seems to us that a disobedience of the injunction being a contempt of the State court, can only be punished by that court. The statute does not contemplate the enforcement of any order by the State court, as the petition for a removal of the cause, is to be filed on the appearance of the defendant. On the requisites of the statute being complied with, it is made the duty of the State court to certify the case. An injunction having been allowed before the bill is filed, is not embraced in the act. As this court cannot punish for a contempt of a State court, the motion for an attachment must be overruled. And we suppose that by the removal, the injunction must fall, so that the motion to dissolve is unnecessary.

A motion to grant an injunction, on the face of the bill, as it now stands before this court, would be proper ; and this obviates all hardship in the case. In this court the case stands as if the bill had been originally filed here, and the defendant having been served with process, is subject to the order of the court. The motions, therefore, for an attachment, and to dissolve the injunction, are overruled.

JAMES TURNER V. THE AMERICAN BAPTIST MISSIONARY UNION.

A State has no power over the public lands within its limits.

When the State of Michigan was admitted into the Union, it assented to a compact, which inhibited the exercise of this power.

A treaty is the supreme law of the land, only, when the treaty-making power can carry it into effect.

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A treaty which stipulates for the payment of money, undertakes to do that which the treaty-making power cannot do, therefore the treaty is not the supreme law of the land.

To give it effect, the action of Congress is necessary.

And in this action, the Representatives and Senators act on their own judgment and responsibility, and not on the judgment and responsibility of the treaty-making power.

A foreign power may be presumed to know the power of appropriating money belongs to Congress.

No act of any part of the government can be held to be a law which has not all the sanctions to make it law.

A reservation of land for a specific purpose, withdraws it from general location, and from pre-emption rights.

Where, in a treaty, 160 acres of land was reserved to be sold, in order to pay over the proceeds of the sale to those entitled to them, is a withdrawal of the land from general appropriation.

A bill is not multifarious, where it does not unite titles which have no analogy to each other, whereby the defendant's litigation and costs are increased.

An injunction to stay an ejectment suit, until matters of equity can be examined, will not be allowed, unless judgment in the ejectment be entered.

Mr. Patterson for plaintiffs.

Frazer & Davidson for defendants.

OPINION OF THE COURT.

This is a case in chancery, which involves several important questions. The power of the general government over the public lands, treaty-making power with the Indians, the powers of a State, and the effect of certain reservations under the pre-emption law, &c.

The complainant states that in July, 1836, he settled upon the land now claimed by him, and in the ensuing spring built a permanent residence, and has ever since continued to reside on the same. That the 7th of July, 1838, the land was proclaimed, by the President, for sale, to take place 15th of October, 1838. On 12th of October, 1838, he proved his pre-emption claim, and tendered \$200 for the entire quarter section. The entire section 25 at the Falls of Grand river, in the State of Michigan, had been selected by the State of Michigan. 21st June, 1838, lot No. 2 was confirmed to the

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State of Michigan. The 9th Feb., 1842, a law of Michigan was passed, allowing Sibley to purchase lot No. 2; that he obtained a certificate of purchase, and Sibley conveyed to complainant a part of lot No. 2, which was a part of the 160 acres mentioned in the treaty.

This Indian treaty was held at Washington city, the 28th of March, 1836, in the 8th article of which it is declared, "The mission establishments upon the Grand river shall be appraised, and the value paid to the proper boards." This was amended by the Senate to read as follows: "The net proceeds of the sale of the one hundred and sixty acres of land, upon the Grand river, upon which the missionary society have erected their buildings, shall be paid to the said society, in lieu of the value of their improvements."

It was proved that the defendants, as a missionary society, had occupied the 160 acres for many years, had built a church and mission-house, and had made other improvements on the tract. It was also proved that the Catholics had occupied the same tract, or a part of it, and had constructed a chapel and other improvements.

On this same tract the complainant had settled, and made his improvements.

The defendants having commenced an action of ejectment, to recover possession of the land claimed by them, the complainant prayed for an injunction against the further prosecution of that suit, and that the court would establish his title, &c.

On the part of complainant it was contended that on the establishment of the State government, Michigan, by virtue of her sovereignty, had a right to all the lands within her limits.

This argument is not now advanced for the first time. Several years ago it was broached in the Senate, and in some of the State legislatures, but it was received everywhere with less favor than its advocates anticipated. It

proffered so rich a boon to the new States, it was expected that they would embrace it with enthusiasm, and hail its advocates as the distinguished friends of State rights. The argument grew less cogent by the lapse of time, as the public lands passed into the hands of individuals, by purchase. Had it not been for this, no one can say that the policy would not have enlisted a powerful, if not successful party, in our political progress.

Looking at the matter as a question of law, we have no hesitancy in saying the argument is groundless. The State of Michigan can exercise no power whatever over the public lands within her limits. She is expressly prohibited from doing this by a compact agreed to in the admission of the State into the Union.

A treaty under the federal constitution is declared to be the supreme law of the land. This, unquestionably, applies to all treaties, where the treaty-making power, without the aid of Congress, can carry it into effect. It is not, however, and cannot be the supreme law of the land, where the concurrence of Congress is necessary to give it effect. Until this power is exercised, as where the appropriation of money is required, the treaty is not perfect. It is not operative, in the sense of the constitution, as money cannot be appropriated by the treaty-making power. This results from the limitations of our government. The action of no department of the government, can be regarded as a law, until it shall have all the sanctions required by the constitution to make it such. As well might it be contended, that an ordinary act of Congress, without the signature of the President, was a law, as that a treaty which engages to pay a sum of money, is in itself a law.

And in such a case, the representatives of the people and the States, exercise their own judgments in granting or withholding the money. They act upon their own responsibility, and not upon the responsibility of the treaty-making power.

Charles J. Rogers v. The City of Cincinnati.

OPINION OF THE COURT.

This is a bill for an injunction. It represents that the complainants are citizens, one of New York, the other of Pennsylvania; that they have constructed a vessel called the "Floating Palace," designed to be used, generally, in the navigable waters of the United States, as an amphitheatre or circus, for the exhibition of equestrian performances, to which it is now applied; that this vessel has been regularly enrolled at the port of Cincinnati, pursuant to the Act of Congress, the certificate whereof is dated the 20th May, 1852; that on the same day the vessel was licensed, pursuant to the Act of Congress, to carry on the coasting trade for one year, for the purpose of the exhibitions aforesaid; that said vessel is moored at the public landing of Cincinnati, and used for the exhibitions aforesaid, but is not within the limits of said city.

And the complainants allege that the city of Cincinnati has commenced a suit against them for making such exhibitions, without any license, contrary to the ordinance, as is alleged, of said city. And praying that the said city may be restrained by injunction from a further prosecution of said suit, until a final hearing in this case. That there is no relief at law, &c.

Jurisdiction in this case may be taken, from the citizenship of the parties; but the relief cannot be given as prayed, unless the facts stated in the bill authorize it. That the exclusive power to regulate commerce among the States, is vested in Congress, in my judgment, is not now a debatable question. Nor that all acts of any State which obstruct such regulations, are void. But the commercial power is not involved, unless the bill makes a case for relief in chancery.

That the courts of the United States, in common with the State courts, will enjoin against any threatened injury, where

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the law gives no adequate remedy, is undoubted. And this principle is applied to private nuisances. But, in every such case, it must be made clear to the court, that the mischief threatened will be irremediable at law.

The ground stated in the bill for an injunction in this case is, that a suit has been commenced against the complainants for a violation of a city ordinance, in exhibiting their circus without a license from the city; and that the complainants having enrolled their vessel, and taken out a coasting license under the Act of Congress, have a right to exhibit their circus, without taking a license from the city. If this were admitted, does it follow, that the State tribunal should be enjoined?

There are two objections to the mode of proceeding suggested. 1. The Circuit Court of the United States has no power to enjoin a procedure in a State court. 2. There is a remedy at law.

The Federal and State courts, in many cases, exercise a concurrent jurisdiction; and in all such cases, the pendency of a suit in the State or Federal court may be pleaded in abatement to an action brought for the same cause in any other court. In every respect, except where the acts of Congress have made special provision, the courts of the State, and of the United States, are as distinct and independent in the exercise of their powers, as the courts of two separate and independent nations. No supervisory power can be exercised by a Federal court over a State court, unless under some special provision. The exceptions are in behalf of citizens of other States, who may remove a suit from the State court to the Circuit Court of the United States, by application at the first term, and giving bail, &c. And also "where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exer-

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applicable here. A new promise would be binding under the English act. Chitty on Contracts 190, 191; 13 Mees. & Wels. 34, 769; 8 Mass. 128; 5 Bar. 369; 11 Ib. 17, 369; 28 Maine 550; 9 B. Monroe 45; Cowper 448.

The theory of law is, that the surety cannot be prejudiced by such an agreement; he may be benefited, and yet, if time be given to the principal the surety is discharged. The case don't turn upon the fact of inconvenience or injury, but giving time for a valuable consideration, is presumed to prejudice the surety. Giving time for a day discharges the surety. 5 Peters' Com. 728; 3 Wash. 70, 76; Paine 305; 7 Hill 250.

On the other side it is urged, in the language of the Supreme Court of the United States, 6 Howard 283: "The principle on which sureties are released, is not a mere shadow without substance. It is founded upon a restriction of the rights of the sureties, by which they are supposed to be injured."

The contract for delay to effect the discharge of the indorser, must affect the rights of the indorser, or prejudice him. *McLemore v. Powell*, 12 Wheat. 554.

In *King v. Baldwin*, 2 John. Chan. R. 559, Chancellor Kent says: "On paying the debt he (the surety) is entitled to the creditor's place by substitution, and if the creditor, by agreement with the principal debtor, without the sureties' consent, has disabled himself from suing when he would otherwise be entitled to sue, under the original contract, or has deprived the surety, on his paying the debt, from having immediate recourse to his principal, the contract is varied to his prejudice, and he is consequently discharged. 6 Peters 250; 1 McLean 93, *Bank U. States v. Hatch*.

Our bankrupt law is different from the bankrupt law of England. The latter operates by way of personal exemption from debts provable. 2 Blk. Com. 473; 2 Maul. & Sel. 23; 2 Com. Di. 157; 1 Stephens' Nisi Prius 689; 1 Barn. &

Adolph. 54 ; Stat. 37 Eliza. 7 ; 4 and 5 Anne 17 ; 6 Geo. 4 ch. 16. But our bankrupt law extinguishes the debt of the bankrupt, even against his indorser. In 7 Howard, *Mace v. Wells*, page 275, the Supreme Court say : " The fourth section of the bankrupt law provides that a discharge and certificate, when duly granted, shall, in all courts of justice, be deemed a full and complete discharge of all debts, &c. And under the fifth section, "All creditors, whose debts are not due and payable until a future day, indorsers, &c., shall be permitted to come in and prove such debts or claims under this act," &c. And a person who neglects so to prove a liability, cannot afterward recover the amount from the bankrupt. So the court held in the above case.

In the case before us, Romeyn, the bankrupt, procured from the plaintiffs a suspension of their right to sue for two months. This agreement, being founded on a valuable consideration, was a valid contract. The indorser within that period could not pay the debt, and sue Romeyn. This, in law, prejudiced the rights of the indorser. But Romeyn was a bankrupt, what remedy was there for the indorser against the bankrupt ? There was no remedy but to present his demand against the estate of the bankrupt, before it was due, under the 5th section of the bankrupt law. He has no recourse, at any time, against the bankrupt, if the proceedings were regular under which he was discharged, as alleged in the pleading, and not contradicted. The time given to Romeyn, under these circumstances, by no possible means, could have operated to the prejudice of the defendant. The settled rule of law, therefore, as to the effect of giving time to the principal debtor, does not and cannot apply in this case. After the extension complained of, as well as before it, the indorser could have proved the extent of his liability against the bankrupt's estate, and that was the only remedy, which, under the circumstances, the law gave him.

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brought the defendant into court. The attachment provided for, is in reference to the mode of original process in a suit, through which an appearance of the defendant is procured. The property attached, is to remain bound, the same as if the cause had been continued in the State court.

It seems to us that a disobedience of the injunction being a contempt of the State court, can only be punished by that court. The statute does not contemplate the enforcement of any order by the State court, as the petition for a removal of the cause, is to be filed on the appearance of the defendant. On the requisites of the statute being complied with, it is made the duty of the State court to certify the case. An injunction having been allowed before the bill is filed, is not embraced in the act. As this court cannot punish for a contempt of a State court, the motion for an attachment must be overruled. And we suppose that by the removal, the injunction must fall, so that the motion to dissolve is unnecessary.

A motion to grant an injunction, on the face of the bill, as it now stands before this court, would be proper ; and this obviates all hardship in the case. In this court the case stands as if the bill had been originally filed here, and the defendant having been served with process, is subject to the order of the court. The motions, therefore, for an attachment, and to dissolve the injunction, are overruled.

JAMES TURNER v. THE AMERICAN BAPTIST MISSIONARY UNION.

A State has no power over the public lands within its limits.

When the State of Michigan was admitted into the Union, it assented to a compact, which inhibited the exercise of this power.

A treaty is the supreme law of the land, only, when the treaty-making power can carry it into effect.

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A treaty which stipulates for the payment of money, undertakes to do that which the treaty-making power cannot do, therefore the treaty is not the supreme law of the land.

To give it effect, the action of Congress is necessary.

And in this action, the Representatives and Senators act on their own judgment and responsibility, and not on the judgment and responsibility of the treaty-making power.

A foreign power may be presumed to know the power of appropriating money belongs to Congress.

No act of any part of the government can be held to be a law which has not all the sanctions to make it law.

A reservation of land for a specific purpose, withdraws it from general location, and from pre-emption rights.

Where, in a treaty, 160 acres of land was reserved to be sold, in order to pay over the proceeds of the sale to those entitled to them, is a withdrawal of the land from general appropriation.

A bill is not multifarious, where it does not unite titles which have no analogy to each other, whereby the defendant's litigation and costs are increased.

An injunction to stay an ejectment suit, until matters of equity can be examined, will not be allowed, unless judgment in the ejectment be entered.

Mr. Patterson for plaintiffs.

Frazer & Davidson for defendants.

OPINION OF THE COURT.

This is a case in chancery, which involves several important questions. The power of the general government over the public lands, treaty-making power with the Indians, the powers of a State, and the effect of certain reservations under the pre-emption law, &c.

The complainant states that in July, 1836, he settled upon the land now claimed by him, and in the ensuing spring built a permanent residence, and has ever since continued to reside on the same. That the 7th of July, 1838, the land was proclaimed, by the President, for sale, to take place 15th of October, 1838. On 12th of October, 1838, he proved his pre-emption claim, and tendered \$200 for the entire quarter section. The entire section 25 at the Falls of Grand river, in the State of Michigan, had been selected by the State of Michigan. 21st June, 1838, lot No. 2 was confirmed to the

may or may not be according to circumstances the *owner* or *proprietor*.

Now, Coe was the holder of the certificates on the same *principle* (and with the same interest) that Brown held them. He held them then as a *trustee*. In case a recovery was had against Rankin on the acceptance, then, the certificates were to be appropriated to the payment of the sum recovered, but if there was no recovery against Rankin, and his defense to the action to the bill of exchange *was sustained*, then, the certificates of stock as a *deposit*, should be returned to the depositor, Rankin, who alone was entitled to them, the deposit having fulfilled its purpose, Coe, under such circumstances, stood in Brown's shoes, and had no proprietary interest ; and, consequently, the declaration is defective in not averring that he had some such valuable interest in the stock, either as owner thereof, or having such a lien as would entitle him to transfer the same for a valuable consideration.

The covenants to account as contained in *this* bond with the recital of the occasion of the obligation, is not equivalent to a promise to pay. To pay what? may be asked. To pay the value of the certificates? If so—to whom? No one is entitled to payment unless he has the right to demand payment. The holder of these certificates, under the circumstances stated in the declaration, had no right to demand payment at any time. A promise to him to account for them must be connected with the covenant to indemnify, and is not a distinct covenant. The accounting for the stock, the defendants were only to pay whatever loss might have accrued in consequence of the stockholder parting with the security placed in his possession for the purpose defined at the time of the deposit.

The declaration avers no loss except in general terms ; if there had been an averment that a recovery had been obtained against Rankin on his acceptance, and which formed the subject matter of the arbitration ; and that the certifi-

cates of stock were needed for the purpose of meeting the demands of such recovery, and they not being re-delivered or accounted for when demanded, and that consequently the plaintiff had been compelled to pay the amount so recovered, and that a loss thereby had been incurred, the declaration would have set forth on the bond a sufficient cause of action.

But such is not the case here, and the court give judgment for defendant on demurrer, with leave, &c.

CIRCUIT COURT OF THE UNITED STATES.

OHIO—OCTOBER TERM, 1852.

THE UNITED STATES v. REDY.

Under the act of Congress, it is not necessary to describe in an indictment for trespass on the public lands, every kind of timber that was cut.

It is sufficient to name one or more species, and in the words of the statute allege other timbers.

An indictment will lie for cutting timber on any of the public lands, though it may not have been reserved for naval purposes.

Mr. Mason District Attorney.

Messrs. Morton & Leland for defendant.

OPINION OF THE COURT.

This is an indictment for cutting walnut and other trees on the public lands of the United States. It was objected that no other timber except what is named in the indictment can be proved. But the court held that under the allegation of other timber, proof other than walnut trees was admissible to the jury.

An objection was also made, that an indictment would not lie for a trespass on the public lands, unless such lands had been reserved for naval purposes. But the court ruled an

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indictment could be sustained, under the decisions, for the cutting of timber on the public lands which had not been reserved for naval purposes.

The court instructed the jury must be satisfied that the person who cut the timber, was employed by the defendant, and that the timber was cut by his direction. If this be proved, the defendant is answerable, under the law, the same as if the defendant had in person committed the trespass.

The jury found the defendant not guilty.

MCGINNIS v. STEAMBOAT PONTIAC.

This court has admiralty jurisdiction over the Ohio river.

Where a steamboat is in actual peril, and one is requested to take charge of her as master, and save her if possible, with no stipulation as to time or wages, the fact of acting as master, not having been so before, will not deprive him of the right to claim salvage.

The fact of peril is to be ascertained from the circumstances surrounding the boat at the time when the salvage service commences, and the fact of escape is not to be taken as proof that there was no peril.

The fact that the exertions of the salvor did not save the boat, she being saved by the particular manner in which the ice broke up, does not deprive him of the merit of a salvor, if he encountered the danger, and did all that could be done under the circumstances.

There is no fixed rule of compensation. It must depend upon the particular circumstances. It may be a per centage upon the property saved, or a fixed sum to be assessed *pro rata* upon the boat and cargo. In this case the latter course is adopted.

Mr. T. Walker Proctor for libellant.

Messrs. C. D. Coffin and A. Taft for defendants.

OPINION OF JUDGE LEAVITT.

This is a libel *in personam* for salvage, prosecuted by Michael N. McGinnis, against the owners and freighters of the steamboat Pontiac, No. 2.

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The material facts stated in the libel, on which the claim of salvage is founded are, that on the 30th of January, 1852, the steamboat Pontiac, with a valuable cargo, bound for Cincinnati, in ascending the Ohio river, some distance below Louisville, met with a gorge of ice, and was in a condition of extreme peril; that having been deserted by all her passengers, and many of her officers and crew, the libellant, then a passenger on the steamboat Sparhawk, also attempting to ascend the river, and involved in the same gorge, was requested by A. Warden, the master, and William F. Belser, one of the owners of the Pontiac, to take charge of her, and try to save her, the said master and owner, then being about to leave her; and that the libellant did accordingly take charge of her, and with the assistance of some of the officers and crew, saved her from her imminent peril, and brought the boat and cargo safely to Cincinnati. The libellant also avers, that upon the arrival of the boat at Cincinnati, he consented to the delivery of the freight to its several owners and consignees, but retained possession of the boat as salvor, till the 10th of February, 1852, when he was forcibly expelled from her by one of the owners, who refused to make him any compensation for his services, except his wages as master, for the time he was in command. The libellant claims reasonable salvage for assistance rendered the boat.

The answer of the owners of the boat and of the cargo, after setting out the circumstances connected with the stoppage of the boat in the gorge of ice, denies that she was in peril; and avers that the libellant was employed to take charge of the boat as master, in the place of Captain Warden, then disabled by sickness, and not as salvor. The answer also denies that the Pontiac was deserted or abandoned at the time the libellant took charge of her, and alleges that she was well provided with men and the means necessary to preserve and protect her; and, that she sustained no damage, and proceeded on her way to Cincinnati, in

charge of the libellant, as master, because of the continued ill health of Captain Warden, and his inability to resume the command ; and, that the services of the libellant do not entitle him to compensation as salvor.

It is also set up in the answer, that the case made in the libel is not within the admiralty jurisdiction of this court.

The facts requiring notice, preliminary to the consideration of the points arising in the case, as established by the evidence, may be summarily stated as follows : In the afternoon of the 30th of January last, the steamboats Ohio, G. W. Sparhawk, Washington, Pontiac No. 2, Milton, and Col. Dickinson, in the order here named, were attempting to ascend the Ohio river, through a narrow opening or channel made through the ice by two boats ahead of them, when the whole body of the gorged ice on both sides of this channel, before stationary, began to move, and in its progress entirely shut up the passage through which the boats before named were ascending ; and they became so involved in the ice as to render it impossible to move by the aid of their machinery either upward or downward. The mass of gorged ice, thus set in motion, moved a distance of two or three hundred yards, when it stopped. By this moving of the ice, the Ohio, being ahead of all the other boats, was forced down for some distance ; the Sparhawk, being the next to the Ohio, was driven down against the Washington ; and such was the force of the collision, that the latter boat was sunk. The Milton was forced against the Col. Dickinson, materially injuring the latter ; and, at the same time, the Pontiac was swung round, and driven stern foremost into a crack or opening in the ice, toward the Indiana shore, where she lay when the ice stopped ; her bow quartering a little up the stream, and her stern within twenty or thirty yards of the shore. During this movement of the ice, and from the great danger in which all the boats were involved, there was much alarm and consternation among the passengers and crews, which was in-

creased by the cry that the wrecked boat—the Washington—was on fire. The passengers and some of the officers and crews of all the boats, except the Ohio, from which escape was impossible, from the thinness of the ice surrounding her, left the boats in the ice and sought safety on shore. The gorged ice extended for some distance above and below where the boats lay ; and, although the natural thickness of the ice, except near the shores, did not exceed six or eight inches, yet as the result of the stoppage of the mass of descending ice, it was so piled up and crowded together, that in some parts of the gorge, it was, as estimated by the witnesses, ten feet, or even twenty feet thick. After the stoppage of the gorge, leaving the Pontiac in the position before described, by the direction of Captain Warden, she was, as far as practicable, made secure in her place by a line or hawser, passed several times from her stern to the shore ; and, by his order also, the ice immediately below the boat was cut away, that she might swing in toward the shore when the gorged mass should again start.

The libellant, who had for some years been engaged in steamboat service on the river, both as a pilot and master, was a passenger on the Sparhawk. Some time in the afternoon, subsequently to the stoppage of the gorge, as before noticed, by the request of Captain Warden, and the concurrence of William F. Belser, one of the owners of the Pontiac, and then a passenger on her, the libellant consented to take charge of her as master, without any agreement as to compensation, or the time he was to continue in command. Captain Warden and Mr. Belser then left the Pontiac, and did not come on board again that night. Between six and seven o'clock in the evening, the libellant took the command of the boat, and was on duty till morning, giving throughout the night the necessary orders, and attending to the usual duties of a master. About eleven o'clock in the night, from the cracking of the ice above, it became certain it would

again shortly be in motion ; and, between three and four in the morning, the gorged mass started and passed down without any injury to the Pontiac. In the morning, after relieving her wheel from the ice which was gorged under and upon it, the boat proceeded on her course upward, in command of the libellant, and arrived at Cincinnati on the 5th of February.

This general view of the evidence will suffice, as opening the way for the consideration of the points arising in the case.

It is insisted, in the first place, by the counsel for the respondents, that the libellant, as master of the Pontiac, has no claim for salvage service ; having performed no duty that he was not bound to perform in virtue of his official relation to the boat.

There is no room to doubt the correctness of the position, as a principle of maritime law, that a master, for any ordinary service in saving his vessel or cargo, cannot assert a claim for salvage. It is well settled, that, "in general, neither the master, nor a passenger, seaman, or pilot, is entitled to compensation in the way of salvage, for the ordinary assistance he may have afforded a vessel in distress, as it is no more than a duty ; for, a salvor is a person who, without any particular relation to a ship in distress, proffers useful service, and renders it, without any pre-existing contract, making the service a duty. But a passenger or an officer, acting as such, for extraordinary exertions beyond the line of his duty, has been deemed entitled to liberal compensation as salvage." 3 Kent's Com. 246 ; 1 Conkling's Admiralty 274.

In the case before the court, the evidence affords no ground for the conclusion, that the services of the libellant were of such an extraordinary character as to entitle him to salvage, if he is to be viewed merely as the master of the boat, under the usual circumstances of employment as such. But it

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seems to the court a pertinent inquiry, whether under the peculiar circumstances in which the libellant took charge of the Pontiac, he is within the scope and reason of the rule excluding a master, for ordinary services, from setting up a claim for salvage. The rule is founded on considerations of public policy, and is designed for the protection of the great interests of navigation and commerce. The obvious propriety, not to say necessity, of providing against temptations to place property afloat on the ocean, lakes, or rivers, in a situation of peril, for the fraudulent purpose of asserting a claim of salvage for its protection and safety, led to its adoption. It is a rule, therefore, founded in good sense; and, in all proper cases, should be rigidly observed. But I do not perceive its applicability to the case of this libellant. He was a passenger on another boat, and could have had no agency in bringing the Pontiac into the position of danger in which it is averred she was placed. He was under no obligation to take command of her, or in any way to incur any hazard or render any aid for her protection or safety. He was requested to take charge of the boat, with an injunction to save her if possible, and without any stipulation as to wages or compensation. Do not these circumstances take the case out of the operation of the rule referred to, excluding a master, in ordinary cases, from asserting a claim for salvage service? And may not the libellant be fairly regarded as one who, within the definition before cited, has virtually proffered and rendered useful service to a boat in distress, without any pre-existing contract making the service a duty? So far as motive is concerned, the facts do not allow the presumption that the libellant would voluntarily incur the responsibilities and hazard resulting from his taking command of the boat, for the trifling pecuniary remuneration he would be entitled to as master, at the ordinary rate of wages, for the few days that he would be employed as such. It is therefore consistent with the facts to suppose, that he looked

for some compensation for his services beyond the usual pay of a master.

In stating, as the result of my examination, that under the circumstances of this case, I do not regard the fact that the libellant was in the position of master at the time the service was rendered, as excluding him from a claim for salvage, it is proper I should say, that I have reached this conclusion, without the aid of any authorities bearing on the point. In looking into the few books on maritime law, which are accessible to me, I have found no case reported, or principle settled, which directly touches the inquiry here involved.

The next point made by the counsel for the respondent is, that the steamboat Pontiac, at the time libellant took charge of her as master, and while he was in command, was not in such a condition of imminent peril as to be a subject of salvage service.

It is a well settled principle of maritime law, that "to warrant a claim of salvage, the danger to the property saved must be real and imminent. Mere speculative danger is insufficient; but it need not be such that escape from it by other means was impossible." *Talbot v. Seaman*, 1 Cranch's R. 1. [1 Cond. R. 229.]

In looking into the evidence, it is impossible to resist the conclusion, that the Pontiac was in great danger, at the time, and after the libellant took charge of her. Her position after the moving of the ice in the afternoon, has been before noticed. She lay with her stern toward shore, in a crack or opening in the ice; her bow out, with a slight angle up stream; her stern being made fast to a rock on shore by lines. Several witnesses—of long experience on the river, and familiar with all its perils—say, they considered it certain the whole mass of ice in the river would be in motion during the night. They also state that there was the strongest probability, amounting, in the opinion of some of them to a certainty, that when the ice did start, all the boats in the

gorge would be lost. Some of the witnesses state, that the Pontiac, from her position and her heavy freight, was in the greatest danger. There was danger—some of the witnesses thought it inevitable—that the heavy shore ice would press down against the upper side of the boat and crush her; or, otherwise, the lines with which she was made fast would be broken, and she would be carried down and wrecked upon Rock Island, a short distance below. It appears, too, from the conduct of the passengers on all the boats, that they thought there was the most imminent danger the boats would be lost during the night. All left the boats and went ashore, although the night was very dark, with constant rain; preferring to encounter the discomfort of exposure to the inclemencies of the weather—some without any shelter, and some imperfectly protected by tents—to remaining on the boats. As many of the officers and crews of the boats as were not needed for their management, also went on shore. Mr Belser, one of the owners of the Pontiac, left her as already stated, with a charge to the libellant, in taking command, to save the boat if possible. Captain Warden also, on account of his feeble health, went ashore; giving, as the reason, that remaining on board, in case of accident to the boat, he might be obliged to take to the water, which would, as he thought, endanger his life, in his then condition of bodily ailment. Several witnesses—some of them officers on the Pontiac—state, that no pecuniary consideration would have induced them to stay on board during the night.

The event so confidently anticipated in the evening, actually happened during the night. The whole mass of the gorged ice moved about three o'clock, threatening all the boats with destruction. But one, however, the Dickinson, was seriously injured. That the Pontiac was not lost was owing to the fact that the gorge broke first toward the middle of the river, and did not carry with it all the heavy shore ice above her.

This summary of the facts in this case shows, I think, conclusively, that the danger to which the Pontiac was exposed during the night referred to, was not merely speculative, but real and imminent. It is true, it is not proved that but for the service and assistance of the libellant the boat would not have been saved. Yet there can be no doubt that his taking the command of her, under the circumstances, involved great personal peril to himself; and that without his services, the boat and cargo would have been in much greater danger of being lost. Captain Warden, very justifiably, under the pressure of sickness, left her, as did also Mr. Belser, one of the owners. The presence of a master, for the proper management and security of the boat and cargo during the night, was indispensable. And the libellant, in consenting to take charge of her, in her condition of peril, and doing all that could be done for her safety, it seems to me, is not only entitled to the credit of courageous and meritorious conduct, but to a compensation, as for a salvage service.

In the United States Digest, Sup. vol. 2, 731, I find the doctrine asserted, that, "in all cases where services are rendered in saving property in danger of being lost on the high seas, or when wrecked or stranded on the shore, it is, in the sense of the maritime law, a salvage service." The case referred to in the Digest is that of the Centurion, Ware's R. 477. I have not been able to refer to the Reports from which the above citation from the Digest purports to have been taken. If the principle is truly stated in the Digest, it is certainly broad enough to embrace the present as a proper salvage claim.

In reference to the amount of the compensation in salvage cases, there is no fixed rule. It is always to be determined by the sound discretion of the court. In the case of the Adventure, 8 Cranch's R. 221, [3 Cond. R. 93.] Mr. Justice Johnson, in delivering the opinion of the court, says: "It (the amount to be allowed) must in every case depend

upon peculiar circumstances, such as peril incurred, labor sustained, value decreed, etc., all of which must be estimated and weighed by the court that awards the salvage." Again: "As far as our inquiries have extended, when a proportion of the thing saved has been awarded, a half has been the maximum, and an eighth the minimum; below that it is usual to adjudge a compensation *in numero*." "The reward should be such as not only to afford an ample remuneration to the salvor for the risk of life and property, and for the labor, privations, and hardships encountered, but so liberal as to furnish a sufficient incentive to similar exertions by others." 1 Conkling's Admiralty 282; 1 Sumner's R. 400, 413. "If the property saved is of great value, or if it was in a condition apparently hopeless, but for the interposition of the salvors, or if the service was undertaken with alacrity, and executed with a high degree of skill and energy; or if it involved extraordinary peril, or required severe and exhausting labor, the retribution ought to be proportionally liberal. The opposite of either of these circumstances ought, consequently, to produce the opposite effect;" 1 Conkling's Admiralty, 285—and the authorities there cited.

But this claim of this libellant cannot be viewed as of the highest order of merit, and as entitling him to a high rate of compensation. His conduct was certainly praiseworthy, and such as to give him a fair claim to remuneration beyond the ordinary pay of a master, but there was not the personal risk, exposure, hardship, and labor; nor is there the certainty that the property was saved through his interposition, that will justify a large allowance to him as a salvor. And it may not be improper here to remark, that in salvage claims arising on the western rivers, the precedents of courts administering the admiralty law on the ocean, in regard to the amount of compensation, cannot be safely adopted. In general, the peril of life, in cases of disaster on our rivers, afford-

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ing a claim for salvage service, is not equal to those resulting from disasters on the ocean.

Upon the whole view of the case, the court adopt the suggestion of Mr. Justice Johnson, in the case before referred to, and award a compensation *in numero*, to the libellant, instead of any fixed per centage, or proportion of the value of the property. And this amount is fixed at five hundred dollars, to be assessed upon the boat and the cargo, according to their value at the port of Cincinnati.

Upon the question of jurisdiction, the court has only to remark, that the opinion of the Supreme Court at its last session, in the case of the *Genesee Chief and others v. Fitzhugh and others*, 12 Howard's Sup. Court R. 443, is regarded as decisive. The decision in that case is authoritative in all the courts of the Union. By it the doctrine is settled, "that the admiralty and maritime jurisdiction granted to the federal government by the constitution of the United States is not limited to tide-waters, but extends to all public navigable lakes and rivers, where commerce is carried on between different States, or with a foreign nation."

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The General Conference of the Methodist Episcopal Church is a delegated or representative body, with limited constitutional powers; and possesses no authority, directly or indirectly, to divide the Church.

In the adoption of the "Plan of Separation" in 1844, there was no claim to, or exercise of, such a power.

As the General Conference is prohibited from any application of the produce of the Book Concern, except for a specified purpose, and in a specified manner; and as the annual conferences have refused to remove this prohibition, by changing or modifying the sixth restrictive rule, the General Conference

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has no power to apportion or divide the Concern, or its produce, except as provided for by said rule.

Said Book Concern is a charity, devoted expressly to the use and benefit of the traveling, supernumerary, and superannuated preachers of the Methodist Episcopal Church, their wives, widows, and children, continuing in it as an organized Church; and any individual, or any number of individuals, withdrawing from, and ceasing to be members of the Church, as an organized body, cease to be beneficiaries of the charity.

It is the undoubted right of any individual preacher or member of said Church, or any number of preachers, or members; or any sectional portions or divisions thereof, to withdraw from it, at pleasure; but in withdrawing, they take with them none of the rights of property pertaining to them while in the Church; and, the withdrawal of the southern and south-western conferences in 1845, being voluntary, and not induced by any positive necessity, is within the principle here stated.

The defendants, as trustees or agents of the Book Concern at Cincinnati, being corporators under a law of Ohio, and required, by such law, "to conduct the business of the Book Concern in conformity with the rules and regulations of the General conference," in withholding from the Church South, any part of the property or proceeds of said Book Concern, have been guilty of no breach of trust, or any improper use or application of the property or funds in their keeping.

This is not a case of a lapsed charity, justifying a court of equity in constructing a new scheme for its application and administration; and the complainants, and those they represent, have no such personal claim to, or interest in, the property and funds in controversy, as will authorize a decree in their favor, on the basis of individual right.

Messrs. *H. Stanbery, Brien, and R. M. Corwine* for complainants.

Messrs. *Ewing, Lane and Riddle* for defendants.

OPINION OF JUDGE LEAVITT.

This bill is prosecuted in the names of Smith, Green, and Parsons, appointed as they aver, commissioners by the authority of the Methodist Episcopal Church South, and of John Kelly and James W. Allen, supernumerary preachers, and John Tevis, a superannuated preacher, all belonging to the traveling connection of said Church, and having, as they allege, in common with the whole body of preachers in

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such connection, a personal interest in all the property held by the Methodist Episcopal Church. They aver that they act by the authority of the general conference and the annual conferences of the Church South, and file their bill for the benefit and in behalf of said Church, and of themselves, and all other traveling preachers, and other persons interested in its funds and property.

The defendants are Leroy Swormstedt and John H. Power, agents of the Book Concern at Cincinnati, and, as such, having, as averred in the bill, in law, the custody and control of the property and effects of said Book Concern, and James B. Finley, all being in the traveling connection of the Methodist Episcopal Church, and interested in its funds and property.

After asserting the claim of the Church South to the property in question, growing out of the alleged division of the Methodist Episcopal Church, in 1845, the bill alleges that the said commissioners have made unavailing efforts to effect an amicable adjustment of the matters in controversy; and they now resort to this court, asking a decree for an account and an equitable apportionment and division of the property and effects set out in the bill.

The property directly involved in this suit is the Methodist Book Concern at Cincinnati, consisting, as the bill alleges, of houses, lots, machinery, printing-presses, books, paper, debts, cash, and other effects, amounting to about the sum of two hundred thousand dollars.

It may be well here to notice, that this Book Concern had its origin at an early period of the Methodist Episcopal Church, in this country. Its primary object seems not to have been, the founding of a charity for the future benefit of the traveling clergy, but to furnish, at a cheap rate, books and periodicals under the sanction and auspices of the church, suited to the wants and improvement of the Methodist communion, in science, morals, and religion; thus serv-

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ing as an auxiliary agency in the consummation of the great end, early avowed by that Church, of "spreading scriptural holiness through these lands." The pecuniary means by which it was enabled to commence its operations, were made up by the donations of preachers and other persons, who favored the laudable purpose of its institution. For a time, all the traveling preachers in the connection were required to contribute annually a fixed sum, in aid of its funds. Its first location was at Philadelphia, from whence, however, it was removed, in 1804, to the city of New York. Through the active efforts of the traveling ministry, who were required to act as agents for the sale of the books and publications of the Concern, they were extensively disseminated and sold. Its means and resources had become greatly increased, and the sphere of its usefulness was fast extending, when, in 1836, it was destroyed by fire. Soon after this calamitous event, as the result of active efforts made in its behalf, it was again placed on a basis of efficiency and prosperity by the liberal contributions, not only of those in the church, but of others not belonging to the connection. In 1820, a branch of the Concern was established in Cincinnati, connected with and subordinate to the institution in New York. In 1839, by an act of the Legislature of the state of Ohio, the branch at Cincinnati was incorporated, and the agents then in office, or who should subsequently be appointed by the general conference of the Methodist Episcopal Church, were created a body politic and corporate by the name of the "Methodist Book Concern;" and it was declared, by the act of incorporation, that the agents "shall hold their agency, and conduct the business of the Concern in conformity with the rules and regulations of the said general conference." Under the able and faithful administration of the agents intrusted with its management, this Book Concern has greatly prospered, and its capital and resources have rapidly increased.

Previous to the year 1796, the profits arising from the sales of books were applied exclusively to pious and charitable objects, but principally to the support of traveling preachers and their families. The conference of that year determined that those profits should be applied wholly to the relief of traveling preachers, including such as were superannuated, and the widows and orphans of those who were deceased. From that period, this fund has been regarded as pledged to this charitable use ; and by the sixth restrictive article of the constitution of 1808, which will be more fully noticed hereafter, it is placed out of the power of the general conference to divert this fund to any other purpose, except by " the concurrent recommendation of three-fourths of all the members of the several annual conferences, who shall be present and vote on such recommendation," and the approving vote of two-thirds of the succeeding general conference.

It may be proper here to state that, by the Discipline of the Church, the annual conferences are the distributors of this fund to those entitled to its benefit. They report to the general conference the names and number of persons who are entitled as beneficiaries to receive it, and the sum to be paid to each, and the amount is then apportioned to the several annual conferences, and paid to them for distribution. But this fund is only to be used to make up deficiencies in the amounts requisite for the support of its beneficiaries. All are not entitled, as a matter of course, to share its benefits ; but such only as are deficient, from the failure of the quarterly and annual conferences to raise the requisite sums, by collections and contributions, for their support.

Such, then, is briefly the origin, history, and purpose of this charity, and the principle on which, and the machinery by which, it is to be administered to its beneficiaries.

These remarks have prepared the way for the consideration of the claim, set up by the complainants, to the property in controversy. And, in stating the conclusions of the court on the

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points presented in this case, it is not regarded as necessary to refer, with great minuteness, to the allegations of the parties, as set forth in the bill and answer; nor to the great mass of documentary proofs read, and analyzed, and largely and ably discussed by counsel on the hearing. There is, in truth, very little conflict between the parties as to the facts involved in the controversy. The questions arising in the case are mainly those of legal inference and construction. These, though not numerically formidable, open a wide field for investigation, and are exceedingly important in their bearing upon the unfortunate controversy pending between the two portions of the great and respectable Methodist community in the United States. And no one, having a just comprehension of the character of the issues in this case, will allege that there was any waste of time or of mental effort in the protracted and able arguments of counsel, in the presentation of their points, on the hearing.

It is distinctly assumed by the complainants, in their bill, and strenuously urged by their counsel, as the basis of a decree of this court, for the apportionment and division of the property and funds in dispute, that the Methodist Episcopal Church in the United States, as it existed prior to and at the time of the action of the general conference of 1844, and the proceedings that were the sequences of that action, is no longer one church, but two churches; which, though alike in faith, doctrine, and discipline, are entirely separate and distinct in their organization. After stating, at length, the resolutions adopted by the general conference on the 8th of June, in the year just named, designated as the "Plan of Separation;" also, the proceedings of the convention of delegates, held at Louisville, on the 1st of May, 1845, and the resolutions of the council of Bishops at New York, on the 2d of July, in the same year, the bill alleges, "that by and in virtue of the foregoing proceedings, the Methodist Episcopal Church in the United States, as it existed before the year 1844, became

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and was divided into two distinct Methodist Episcopal Churches, with distinct and independent powers and authority, composed of the several annual conferences, charges, stations, and societies, lying and being north and south of the aforesaid line of division."

As the proceedings referred to present one of the most important questions arising in this case, it will be proper to notice them here with some particularity.

The first of the resolutions embodied in the so-called "Plan of Separation" is in these words:

"*Resolved*, By the delegates of the several annual conferences, in general conference assembled,

"1. That should the annual conferences in the slaveholding states find it necessary to unite in a distinct ecclesiastical connection, the following rule shall be observed with regard to the northern boundary of such connection: All the societies, stations, and conferences, adhering to the Church in the south by a vote of the majority of the members of said societies, stations, and conferences, shall remain under the unmolested pastoral care of the Southern Church; and the ministers of the Methodist Episcopal Church shall in no wise attempt to organize churches or societies, within the limits of the Church South; nor shall they attempt to exercise any pastoral oversight therein, it being understood that the ministry of the South reciprocally observe the same rule in relation to stations, societies, and conferences, adhering, by a vote of the majority, to the Methodist Episcopal Church; provided, also, that this rule shall apply only to societies, stations, and conferences, bordering on the line of division, and not to interior charges, which shall, in all cases, be left to the care of that Church within whose territory they are situated.

"2. That ministers, local and traveling, of every grade and office in the Methodist Episcopal Church, may, as they prefer, remain in that Church, or, without blame, attach themselves to the Church South.

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"3. *Resolved*, by the delegates of all the annual conferences, in general conference assembled, That we recommend to all the annual conferences, at their first approaching sessions, to authorize a change in the sixth restrictive article, so that the first clause shall read thus : 'They shall not appropriate the produce of the Book Concern, nor of the chartered Fund, to any other purpose other than for the benefit of the traveling, supernumerary, superannuated, and worn-out preachers, their wives, widows, and children, and to such other purposes as may be determined upon by a vote of two-thirds of the members of the general conference.'"

4. *Provides*, That when the general conference shall have voted to concur in the proposed change of the sixth restrictive rule, the agents at New York and Cincinnati shall, and they are hereby authorized and directed to deliver over to any authorized agent or appointee of the Church South—should one be organized—all notes and book accounts against the ministers, church members, or citizens within its boundaries, with authority to collect the same for the sole use of the Southern Church ; and the said agents shall also convey to the aforesaid agent or appointee of the South all the real estate, and assign to him all the property, including presses, stock, and all right and interest connected with the printing establishments at Charleston, Richmond, and Nashville, which now belong to the Methodist Episcopal Church.

5. *Provides*, That when the change in the sixth restrictive rule shall be made, there shall be transferred to the agent of the Southern Church, so much of the produce and capital of the Methodist Book Concern, as will, with the notes, book accounts, presses, etc., mentioned in the last resolution, bear the same proportion to the whole property of said Concern, that the traveling preachers in the Southern Church shall bear to all the traveling ministers of the Methodist Episcopal Church ; the divisions to be made on the basis of the number of preachers in the forthcoming Minutes.

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6. Directs the manner in which the payments and transfer shall be made.

7. Appoints commissioners to carry into effect the arrangements, etc.

8. Directs the agents at New York to act in concert with Southern agents, in carrying out the resolutions, etc.

"9. That all the property of the Methodist Episcopal Church, in meeting-houses, parsonages, colleges, schools, conference funds, cemeteries, and of every kind, within the limits of the Southern organization, shall be forever free from any claim set up on the part of the Methodist Episcopal Church, so far as this resolution can be of force in the premises."

The tenth, eleventh, and twelfth resolutions are not important.

The first resolution of the Louisville Convention is the only one necessary to be set forth. It is as follows :

"Be it resolved by the delegates of the several annual conferences of the Methodist Episcopal Church, in the slaveholding states, in general convention assembled, That it is right, expedient, and proper, to erect the annual conferences represented in this convention, into a distinct ecclesiastical connection, separate from the jurisdiction of the general conference of the Methodist Episcopal Church, as at present constituted ; and accordingly, we, the delegates of said annual conferences, acting under the provisional ' Plan of Separation,' adopted by the general conference of 1844, do solemnly *declare* the jurisdiction hitherto exercised over said annual conferences, by the general conference of the Methodist Episcopal Church, *entirely dissolved* ; and that the said annual conferences shall be, and they hereby *are constituted*, a separate ecclesiastical connection, under the provisional ' Plan of Separation' aforesaid, and based upon the Discipline of the Methodist Episcopal Church ; comprehending the doctrines and entire moral, ecclesiastical, and economical rules and

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regulations of said Discipline, except only in so far as verbal alterations may be necessary to a distinct organization, and to be known by the style and title of the Methodist Episcopal Church South."

These, then, are the proceedings by force of which, it is insisted, a division of the Methodist Episcopal Church has been legally and constitutionally effected; and that, as a necessary result, all rights of property pertaining to the complainants, and those they represent, as traveling preachers of that Church, belong to them in their connection with the Church South. I may be permitted here to remark, that, in the investigation of this subject, I am impressively reminded of the responsibility of my position, and readily concede that, however satisfactory to my own mind, may be the conclusions to which I am conducted, other minds, of equal candor and greater strength, may reach a very different result. In dealing with the proposition now to be considered, as well as others involved in this controversy, it has been my aim studiously to exclude all merely extrinsic considerations, and to ascertain the true standing of these parties in a court of equity, as connected with a question of property. In this pursuit I am not at liberty to obey the mere promptings of sympathy, and thereby disparage well-settled principles; or, under the pressure of any supposed exigency, so to pervert or misapply established maxims of construction as to turn away the stream of Justice from its wonted channel. It is an error too prevalent, especially out of the legal profession, to suppose that a Chancellor, for the purpose of reaching a seeming equity, may yield himself to the guidance of an unregulated and latitudinous discretion, without examining too closely or scanning too severely, the legal posture of the parties before him. Such, however, is clearly a perverted view of the powers and duties of a court of equity. In practice, it can not fail to work disastrously; putting afloat, on the sea of uncertainty, the most valued civil and social rights.

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It is obvious that the question of the power of the general conference to adopt the "Plan of Separation"—assuming that it was intended to divide and dismember the Methodist Episcopal Church, and that it has legitimately resulted in division and dismemberment—is decisive of the rights of the parties, as involved in this suit. If the complainants, and those they represent, have placed themselves on the basis of the authoritative and constitutional action of the general conference, they have the same rights which pertained to them before the severance of the Church; but, if the conference has, in this act, transcended its just constitutional powers, to that extent, its acts are void: and the complainants occupy the position of those who, voluntarily and without sufficient warrant have placed themselves out of the pale of the Methodist Episcopal Church, and are no longer of that class of persons, who are the designated beneficiaries of the charity in question. In other words, they must show a present, existing right to a participation in the benefits of that charity, to justify the decree which they ask for, at the hands of this court.

The views of counsel are widely variant, as to the nature and effect of the "Plan of Separation." On the part of the complainants, it is urged with great earnestness, that the division, as contemplated and provided for, by this Plan, involves a mere change in the organization of the Methodist Episcopal Church; not destructive of its unity and integrity; because the dissevered parts are of the same faith, and under the same form and constitution of government, and in the pursuit of the same great purposes. It is contended, that the power to change, so far as mere organization is concerned, has always been recognized and acted upon by the Methodist Church; that, from the very genius of Methodism, it must change its organization, whenever it is necessary to promote its efficiency, and subserve the great purpose which it avows, of promulgating the Gospel to all men, and

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"spreading Scriptural holiness through these lands;" and that this power of change, not being prohibited expressly by the constitution, necessarily vests in, and pertains to the general conference, as the supreme power of the Church.

On the other hand, it is insisted, with equal zeal, that unity of organization, as well as of faith and doctrine, is an essential element of all associations of men in church relations, and that the overthrow and destruction of such an organization, imports the overthrow and destruction of the church itself. It is contended, therefore, that the "Plan of Separation," in the sense in which it is claimed to be operative by the complainants, as effecting a division of the church, is equivalent to its destruction; and that the general conference, as a delegate or representative body, acting under a constitution with express limitations of powers, and subject, moreover, to restrictions deducible by necessary implication, transcended its jurisdiction in the adoption of the "Plan of Separation;" and that, as a necessary consequence, the act is a mere nullity.

The question presented, it may be remarked, is not, whether there does or does not exist in the Methodist Episcopal Church, a power to destroy its organization, and entirely to reconstruct, not only its government and Discipline, but to change its standards of faith and doctrine; but whether this power rightfully exists in the general conference. The power of change—of destruction itself—doubtless exists somewhere; but, if it has not been expressly delegated, it remains with those who are the original depositaries of all power.

The inquiry is now presented, and it is certainly one of great materiality in this case: What are the constitutional powers of the general conference of the Methodist Episcopal Church, since the change of government, which took place in 1808? It is not necessary here to inquire, what were the powers of the body called the general conference, which ex-

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isted in the church from the year 1792 till 1808. It may perhaps be conceded, that previous to the last-named year, the general conference, composed as it was of the entire body of preachers in the traveling connection, in the absence of any constitutional limitations, was invested with the supreme power of the church. They possessed in themselves, all the elements of sovereignty, and were amenable to no power but that of the Most High. From my examination of the history and polity of the Church, I can not perceive that the laity, whatever may have been their indirect influence in its government, have ever been recognized as one of its constituent elements; and if the general conferences subsequent to 1808 can be regarded as the rightful successors of the prior conferences, in the sense of being transferees of all their powers, it would result that these bodies possessed, and still possess, plenary power to divide, or otherwise disorganize and destroy the Church. And the general conference of 1844, instead of creating two churches, as the complainants insist they have done, could have multiplied them without limit, and have placed each portion of the divided unit on the basis of a distinct and independent church. It is undeniable, that the power of division, imports a power to divide indefinitely; and as a necessary consequence, division carries with it the destruction of the being and identity of the original church.

The inquiry into the powers of the general conference, under the constitution of 1808, requires a brief reference to some facts connected with the early history of the Methodist Episcopal Church in this country.

The introduction of Methodism here dates back to the year 1766. For the seven years which succeeded, the affairs of the Church were conducted by quarterly conferences. No conference, composed of all the traveling preachers, was held till the year 1773. From this period, till the year 1783, there was no assembly of all the traveling preachers, but

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local conferences, at different places, were held, as might suit the convenience of the ministers. Till the year 1783, no rule had been adopted making it the duty of the traveling preachers to attend the conferences; such an order was passed at the conference held that year. It was not, however, till the year 1784, that the Church was fully organized as an independent Church. This measure was adopted pursuant to the advice and recommendation of John Wesley, in his letter to Doctor Coke and others, of Sept. 10, 1784. At a meeting of preachers, held on the 15th November of that year, at which the Superintendents—Asbury and Coke—were present, this letter was submitted to, and approved of by those in attendance. They accordingly called a conference, which met at Baltimore, on the 25th of December, 1784; and hence is called the Christmas conference. The call embraced all the traveling preachers; and at the time appointed, sixty of the eighty-three preachers then in the connection, attended. They organized the Church and adopted a form of government, with a system of discipline, and a standard of doctrine and faith, and elected Asbury and Coke, bishops, or Superintendents. From this time, Wesley ceased to claim or exercise any authority over the Church, and the supreme power vested exclusively in the whole body of the traveling preachers.

The first general conference after the organization of the Church, in 1784, was held on the 1st of November, 1792, and was composed of all the traveling preachers, who had been received into full connection. This is considered as the first regular general conference. Similar conferences were held in the years 1800, 1804, and 1808.

In 1806 Bishop Asbury submitted a paper to the annual conferences, recommending the calling of a conference at Baltimore, in the month of May, 1807, to be composed of seven delegates from each of the seven annual conferences. According to the statement of Doctor Bangs—2d vol. His-

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tory of the Methodist Episcopal Church, page 177—among the reasons set forth by the Bishop in favor of this measure, were the following: "To provide for a more permanent mode of Church government;" and, also, "to provide for a future *delegated* general conference, whose powers should be defined and limited by constitutional restrictions;" for hitherto, says the historian, "the general conference possessed unlimited powers over our entire economy." This proposition for a change in the form of government, received the assent of all the annual conferences, except that of Virginia. Its defeat there, led to the abandonment of the plan for a time. The project was revived in 1808, by a memorial from the conference of New York, urging its adoption; and the conference of 1808 agreed to the proposed change, and adopted a constitution, providing in future for a delegated or representative general conference. The first article of this constitution provides that,

The general conference shall be composed of one member for every five members of each annual conference, to be appointed by seniority or choice, at the discretion of such annual conference; yet so that such representative shall have traveled four full calendar years, etc. By the 2d article it was provided that,

"The general conference shall meet on the first day of May, 1812, in the city of New York, and thenceforward once in four years perpetually; in such place or places as shall be fixed by the general conference from time to time," etc. The 3d article requires, "that it shall take two-thirds of the representatives of all the annual conferences to make a quorum for the transaction of business." The grant of power to the general conference is in these words,

"The general conference shall have full power to make rules and regulations for our church, under the following limitations and restrictions;" namely,

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1. The general conference shall not revoke, alter, or change, our articles of religion, nor establish any new standards or rules of doctrine, contrary to our present existing and established standards of doctrine.

2. They shall not allow of more than one representative for every five members of the annual conference, nor allow of a less number than one for every seven.

3. They shall not change, or alter, any part or rule of our government so as to do away Episcopacy, or to destroy the plan of our itinerant General Superintendency.

4. They shall not revoke or change the General Rules of the United Societies.

5. They shall not do away the privileges of our ministers or preachers of a trial by a committee, and of an appeal; neither shall they do away the privileges of our members of a trial before the society, or by a select number, or of an appeal.

6. They shall not appropriate the produce of the Book Concern, or of the Charter Fund, to any purpose other than for the benefit of the traveling, supernumerary, superannuated, and worn-out preachers, their wives, widows, and children.

7. Provided, nevertheless, that upon the joint recommendation of all the annual conferences, then a majority of two-thirds of the general conference succeeding, shall suffice to alter any of the above restrictions.

From this hasty sketch, the conclusion seems to follow, that in 1808 an important change took place in the government of the Methodist Episcopal Church. Before that time, the supreme power of the Church was vested, undeniably, in the whole body of traveling ministers belonging to the connection. All the general conferences, from that held in 1784 to that of 1808, were composed of these ministers; not in the character of delegates, but each one in his primary capacity, and as a depositary of a portion of the sovereign

power. They were called general conferences, because all traveling preachers, who had been in the connection for the requisite time, were invited to attend, and were members of those bodies in virtue of their offices as preachers. They were thus designated in contradistinction to the irregular local conferences, which had been previously held between the meetings of the general conferences. This body of traveling preachers, met, in a conventional capacity in the conference of 1808, created a new organism, before unknown to the church—a representative or delegate general conference—and invested it, not with all power, but so much only as they deemed necessary to the ends of its creation. They provided for its permanency, by declaring that it shall meet, thenceforward, “once in four years perpetually.” Prior to this change, the government of the Church, so far, at least, as the structure and powers of the general conference were concerned, was essentially a democracy, in which the masses met together for the transaction of their business. But, under the constitution of 1808, this body was elective; its members being chosen by the annual conferences, according to a prescribed ratio of representation. Under the old system, the members of the general conference represented no body but themselves, and were amenable to no earthly power for their conduct; under the new system, they had constituents, to whom they were answerable; and they were limited in their powers by express constitutional restrictions. And it is no where expressly declared, nor is it fairly inferable from the facts of the case, that the general conference subsequent to 1808, were the successors of those which had previously existed, or the transferees of the powers with which they were invested. Indeed, there are good grounds for the conclusion, that it was one of the main objects of the change, to provide for suitable limitations on the powers of the general conferences. True, the great accession of numbers to the Church—one of the cheering results of the faithful

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labors of the ministry—and her greatly-increased and rapidly-expanding territorial limits, rendered it highly expedient to constitute a delegated conference. It was injurious to the interests of religion, as well as inconvenient and burdensome to the ministry, that the whole body of laborers should be called from their respective fields, to attend the meetings of the general conference. Besides, at the period of the change, several new states had been added to the Union, the great western valley was fast filling up with settlers, and every thing betokened the vast extension of our limits, since so fully realized. Methodism had kept pace with the steadily-advancing wave of population; and the indications were clear, that the affairs of the Church could not be safely intrusted to the general conference, as constituted prior to 1808.

But the intention of the framers of the constitution of 1808, is not left to mere inference or construction. It is most apparent, from the terms of the instrument itself, that it was not intended to invest the general conference with absolute or supreme power. In the six articles, which have been before quoted, and to which some attention will be given hereafter, the powers of the general conference are expressly restricted; and these restrictions are wholly inconsistent with the assumption of unlimited power in that body. The general grant of power, as already noticed, is, "to make rules and regulations for our Church," subject to the restrictive articles. It is not pretended that there is any express grant of power to divide the Church, or otherwise interfere with its organization, so as to destroy, or in any way effect, its unity or perpetuity. If such a power exists, it must be deduced from the general grant, "to make rules and regulations." The general conference, in the exercise of its jurisdiction, can look only to the written charter of its creation; and I take it to be a settled canon of interpretation, in reference to all bodies possessing merely derived or delegated powers, and

acting under a written constitution, that they can take none, not expressly granted, or clearly implied as necessary to the exercise of those that are granted.

What, then, is the nature and the extent of the power vested in the general conference, by the clause of the constitution of 1808, granting "full powers to make rules and regulations for our Church?" Does it fairly imply a right to divide or dismember the Church? This is clearly a very important inquiry in this case; for, if this power existed, and was actually exercised by the conference of 1844, it results, that the complainants are clearly entitled to the relief prayed for in their bill. On the other hand, if the power of severance is not vested in that body, the Methodist Episcopal Church still remains in its integrity and unity; and the defendants, as its accredited agents, are rightfully in the possession of the charity in controversy, without a shadow of doubt as to who are its proper beneficiaries. And, upon this state of case, there would be no just ground for the interference of a court of equity, to withdraw it from their custody and control, and decree its distribution, *Cy. pres*, or otherwise.

It may be remarked here, that this claim, urged by the complainants in behalf of the general conference, to the supreme and unlimited control over the Church, in all cases in which the exercise of their powers are not expressly restricted, is certainly one of a very imposing character. It is no less than the claim of a power to divide, or remodel, or otherwise destroy, the Church in its organization, at their own will and pleasure. Upon such a claim of power, nothing can rightfully be left to presumption in favor of its existence; it must be sustained by clear, affirmative reasons. Under the influence of a proper jealousy of such a claim, a court will be inclined to act upon the rational intendment, that all power not granted, is reserved to those who were its original depositaries. In this age, and in the light of our

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republican institutions, this may be affirmed to be a safe rule of construction.

The power "to make rules and regulations for *our Church*," must be construed as referring to the church in its organization. It is impossible to conceive of the existence of a Church, associating together through human agency or instrumentality, without connecting with it the idea of organization. It is this alone that makes it an entity—a thing cognizable by the senses—acting and capable of being acted on. It is true that theologians properly recognize a Church on earth—universal, spiritual, and invisible—which is without organization. It embraces in its wide-spread arms, all human beings, in all the realms and climes of the earth, without respect to name, sect, or denomination, and whether included or not in any visible, external Church relation, who yield their cordial assent to, and sincerely and obediently practice in their lives, the great fundamental, revealed truths of the Christian religion. Though without organization, its members have "one Lord, one faith, one baptism," and are bound together "in the unity of the faith, and of the knowledge of the Son of God." In any other sense, there can be no Church without an organization; it is the essential element of its being, and its destruction is necessarily the destruction of the being itself.

It is claimed, as a fair construction of the power granted to the general conference—a body vested only with a delegated authority—that the power "to make rules and regulations for our Church," implies the right to adopt any measure deemed expedient by that body, so far as organization is concerned. It may declare the Methodist Episcopal Church—it is insisted—now existing as a unit, bound and acting together in one compact organization—under the control of one regularly-appointed and constitutional general conference—to be two or more distinct and independent Churches, each having a general conference of its own, with no communion or

fellowship, one with the other, except that which results from a common faith. Can it be that the constitution of 1808 vests, or intended to vest, in the general conference such a power? If it exists, the destinies of the Methodist Episcopal Church are completely at the disposal of any general conference; and that body may, at any time, at its own discretion and upon its own mere motion, on the occurrence of a sudden and unforeseen emergency, and without knowing or taking any measures to ascertain, the will of their constituents, take down and demolish their entire organization. This, it seems to the court, is a power inconsistent with the power "to make rules and regulations." The power granted is one designed to be exerted *for* the Church, in the adoption of such measures as shall best insure its efficiency and prosperity. The "rules and regulations" must, therefore, be adapted to the nature and purposes of the organism, committed to the care and guardianship of the conference. And any exercise of its authority, resulting in the overthrow and demolition of the Church, must be viewed as repugnant to, and in violation of, the granted power. Nor does it change the aspect of the question, that while there are specified restrictions in the exercise of the powers of the general conference, the right to change or destroy the existing organization of the Church is not enumerated as one of them. The founders of the constitution of 1808 may well be presumed to have given their assent to it, from the deep conviction that it was well adapted to secure and promote the well-being of the Church. To have inscribed in it, as among the restrictions of the constitution, that the general conference should at no time divide or destroy the Church, would have involved an absurdity. The implication of such a prohibition would necessarily result from the character and purposes of the constitution. Upon any other principle the power to govern may be held to imply a power to destroy. Such an implication is not admissible, even in the case of a civil ruler or sovereign,

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invested with the most absolute power. It is an acknowledged principle, that governments are instituted to promote the happiness and the welfare of the governed ; and every investiture of power is made with the implied pledge, that it shall be exercised to that end. This doctrine applies as well to ecclesiastical as to civil governments. The grant of power to the general conference, under the constitution of 1808, must be construed in subordination to this great principle. That body is the mere depository of certain delegated powers ; and, as it seems to the court, can not, upon any just principle, in the absence of an express grant of such a power, destroy the organization in virtue of which it has been brought into existence, by division, or otherwise. And, as already indicated, the fact that the general conference is not, by an express provision, inhibited from the exercise of the power to divide or destroy the Church, does not furnish a foundation for an inference in favor of its existence.

This view of the powers of the general conference of the Methodist Episcopal Church is not now, for the first time, asserted and maintained. There is evidence before the court, in this case, that it has been heretofore insisted on, with great ability, by some of the most distinguished individuals of that Church. The proof of this is found in various parts of the documentary evidence submitted to the court. Some of these will be briefly noticed.

In the first place, it may be remarked, that the doctrine of the limited nature of the constitutional power of the general conference is strongly asserted and ably maintained in the protest of the minority in Bishop Andrew's case. In this paper it is said, "The general conference is in no sense the Church, not even representatively. It is merely the representative organ of the Church, with limited powers to do its business in the discharge of a delegated trust." (1 Proofs, 108.) And again, in the Pastoral Address of the Louisville convention, the same idea is reasserted in this language,

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"The general conference, or a majority thereof, is not the Church." (2 Proofs, 65.) And the report of the committee of the annual conference of Alabama, which was adopted by that body, strongly and unqualifiedly asserts the same principle. After admitting the right of a conventional meeting of the whole Church to change or revolutionize it, either in doctrine or in organization, it is said in this paper: "But before the general conference can plead this right, [referring to the case of Bishop Andrew,] it must show when and where such plenary power was delegated to it by *the only fountain of authority—the entire pastorate of the Church.*" (2 Proofs, 51.) In the report of the Committee on Organization, in the Louisville convention, in discussing the rights and powers of the Episcopacy and the general conference, it is said, "It is confidently, although most unaccountably maintained, that the six short restrictive rules, which were adopted in 1808, and first became obligatory, as an amendment to the constitution, in 1812, are, in fact, the *true and only* constitution of the Church. This single position, should it become an established principle of action to the extent it found favor with the last general conference, must subvert the government of the Methodist Episcopal Church. It must be seen, at once, that the position leaves many of the organic laws and most important institutions of the Church entirely unprotected, and at the mercy of a mere and ever-fluctuating majority of the general conference." (1 Proofs, 86, 87.) And, again: "This theory assumes the self-refuted absurdity, that the general conference is in fact the government of the Church, if not the Church itself." (1 Proofs, 87.) Again: "With no other constitution than these mere restrictions upon the power and rights of the general conference, the government and discipline of the Methodist Episcopal Church, as a system of organized laws and well-adjusted instrumentalities for the spread of the Gospel and the diffusion of piety, and whose living principles of energy and action have so long com-

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manded the admiration of the world, would soon cease even to exist." (1 Proofs, 87.) This argument was directed against the asserted power of the general conference as exercised in the case of Bishop Andrew ; but it is not less applicable, or forcible and conclusive in regard to the present question, than to the case so ably discussed by the committee. This committee, then, denounce as "wild and revolutionary" the claim "that the general conference may do, by right, whatever is not prohibited by the restrictive rules ; and, with this single exception, possess power supreme and all-controlling, and this, in all possible forms of its manifestation—legislative, judicial, and executive—the same men claiming to be, at the same time, both the fountain and the functionaries of all the powers of government, which powers, thus mingled and concentrated into a common focus, may, at any time, be employed at the promptings of their own interests, caprice, or ambition." (2 Proofs, 88.)

These references, for the purpose indicated, are deemed quite sufficient. They show that the greatest minds in the Church did not regard the constitution of 1808 as conferring absolute power on the general conference, limited only by the "six short restrictive rules." And they prove, by a power of argument not easily resisted or overcome, that there were implied restrictions on the power of that body, not less stringent and authoritative than those expressly declared ; and, moreover, that the safety, efficiency, and perpetuity of the Church were directly involved in the recognition and rigid observance of these implied restrictions. That these arguments are applied to a case, differing in its aspects from that now under consideration, in no wise detracts from their force.

But this asserted supremacy of the general conference of the Methodist Episcopal Church, and its consequent authority to break up and destroy its organization, at any time, according to its views of expediency, it is insisted by the com-

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plainants' counsel, has the sanction of precedent. It is said the power was exercised in the Canada case, and that this case was, in all respects, identical with that now under consideration. It is insisted, therefore, that, as affording a construction given by the general conference to its powers, it is to be viewed as a settlement of the question. It is not proposed to enter upon an inquiry as to the authority of precedent on a question of disputed and doubtful constitutional power, when presented for judicial determination. Without doubt, a power long exercised, and having become a settled usage of the body claiming and exercising it, will be viewed as rightfully pertaining to it; and a court will not be disposed to open the door of inquiry in relation thereto. But the exercise of a power in a single instance can scarcely be claimed as proof of its existence, if not explicitly granted, and can not, therefore, be viewed as entitled to the weight of an established precedent.

What, however, are the facts in the Canada case? The province of Lower Canada, previous to 1812, had been included in the Genesee conference. Afterward it was embraced partly in the New York conference, and partly in the New England conference; and later still the whole province was attached to the Genesee conference; but it never constituted a separate conference, under the authority of the general conference of the Methodist Episcopal Church in the United States. By reason of discords and painful collisions between the preachers laboring in that province belonging to the British conference, and those belonging to the general conference of the Church in this country, the latter, by an amicable arrangement, were wholly withdrawn from that field. This, however, in no way interfered with the existing organization of the Church, and involved the exercise of no doubtful power.

The province of Upper Canada, at different periods intervening the year 1804 and 1820, had been included within sev-

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eral conferences of the Church in the United States. At the general conference of 1820, a resolution was adopted authorizing the establishment of a conference in this province. This was done in 1824; and the conference was designated as the Canada conference, embracing within its limits the whole province. The Canadian Methodists were still embarrassed; and at the general conference of 1828, they presented a memorial to that body, expressing a wish to be disconnected from the Church in the United States, and to organize a Canadian Church on an independent basis. The reasons set forth by the memorialists were mostly of a political character, growing out of the fact that they belonged to a civil jurisdiction foreign to that of the United States. The committee to which this memorial was first referred, reported that it was unconstitutional to grant its prayer without the assent and approbation of the annual conferences. A substitute was offered for this, containing a preamble and several resolutions. The first resolution declared, that the compact existing between the Canada annual conference and the Methodist Episcopal Church in the United States be and hereby is dissolved by mutual consent. This resolution was adopted by a large majority; and the other resolutions were referred to a special committee. The committee reported a preamble and several resolutions, which were adopted. In the preamble it is recited, that the Methodist Episcopal Church of the United States had extended its jurisdiction over the Canadian Methodists at their express desire, and that they, "under peculiar and pressing circumstances, do now desire to organize themselves into a distinct Methodist Episcopal Church, in friendly relations with the Methodist Episcopal Church in the United States." The first resolution provides, in substance, that if the Canadian conference shall definitely determine on this course, and elect a superintendent, he may be ordained by any one of the bishops of the Methodist Episcopal Church. The second expresses a

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desire that the missionaries in Upper Canada, laboring under the care of the Church in the United States, may be permitted to continue, etc. The third resolution declares, that ministers and others should be furnished with the publications of the Methodist Episcopal Church on the same terms as their agents in the United States; and, that, while the Canadian Church continued to patronize the Book Concern, it should be entitled to its annual proportion of the dividends. Upon the adoption of these resolutions, the resolution of the previous committee, which had passed, was rescinded. The whole action of the general conference is, therefore, embodied in the resolutions reported by the last committee. These do not assert or pretend to claim any power in the general conference to authorize the separation of the Canada conference, from the Church in the United States. There had been a decided opinion, in the report of the first committee, that the conference could not constitutionally sanction such separation. And it seems that it was only because of the peculiar circumstances under which the jurisdiction of the Methodist Episcopal Church, had been extended over the province, and the annoyance and disabilities under which its preachers and members labored, for the reasons before stated, that the general conference was induced to take any action in the case. In their action they asserted no claim to any power to authorize the separation of the Canada conference, but simply declared certain friendly terms on which that conference might withdraw. It was upon the suggestion of Bishop Emory, that this conference had been recognized as a part of the Methodist Episcopal Church, on principles wholly variant from those which applied to the conferences in the United States, that the general conference assented to its withdrawal on the terms embraced in the resolutions which were adopted. (3 Bangs's History, 390, 391.)

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Without enlarging on this point, it may be sufficient to remark, that the proceedings in the Canada case furnish no parallel to the action of the general conference of 1844, in so far as the latter can be construed into an authorized division of the Church. So far from this, the general conference, in the Canada case, give a very intelligible negative to the possession or exercise of any such jurisdiction, without first having obtained the assent of the annual conferences. The application of the Canada conference for an apportionment of the proceeds of the Book Concern, and the proceedings connected with it, will be noticed in another place.

There is another very important inquiry in this case, which may be stated thus : If the power of division properly belonged to the general conference, was it, in fact, exercised by that body ?

It has been before intimated, that there exists somewhere in the Church, a power to change, overturn, and destroy, not only its organization, but its system of doctrine and discipline. If it is not in the general conference, it is not, perhaps, material to inquire where it vests ; though this court has no hesitancy in holding that such a power would belong to the body of the traveling ministry, assembled *en masse*, in a conventional capacity. It was precisely such a body that in 1784 gave the Church an organized existence in this country ; and such a body could, without doubt, change its entire polity. Perhaps, too, this power could be invested in a convention, constituted on the representative principle ; but it would be necessary, in such a case, that the delegates should be elected with express reference to the question of a change of government, and should be clothed by their constituents with ample powers to perform that specific function. But clearly the existence of this power, either in a convention composed of all the traveling preachers, or of delegates elected by them to revise or remodel the government of the Church, strongly

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negatives its existence in the general conference under the constitution of 1808.

If such a power existed, and was intended to be exerted by the general conference of 1844, it may be presumed, from the known intelligence of that body, that the object proposed would have been consummated by direct and straightforward action. Now, it is not pretended that the "Plan of Separation" is operative in itself to authorize a division of the church; it is only as connected with the action of the Louisville convention that such effect can be claimed for it. In fact, the first resolution of the "Plan" refers the decision of the question of the necessity and expediency of a separation, to the conferences of the slaveholding states. Its language is, "Should the conferences of the slaveholding States find it necessary to unite in a distinct ecclesiastical connection." There is no requisition that their proceedings shall be reported to the general conference, or be submitted to all the annual conferences for ratification or approval; but the decision of the southern conferences is made final. The power of the general conference, so far as it professed to exercise any in this matter, was clearly a legislative power. Indeed, if intended to work the division and dismemberment of the church, it is not easy to conceive of a higher function of legislation than that claimed for the conference. The grave inquiry is here presented, Could it delegate to another body the exercise of such a power? Nothing is hazarded in the proposition, that such a power, from its very nature, is not transferable. In their report to the Louisville convention, the Committee on Organization place their right to act in the premises expressly on the ground of, authority derived from the general conference. They say "that all the right and power of the general conference, in any way connected with the important decision in question, were duly and formally transferred to the annual conferences in the slaveholding States, and exclusively invested in them." (2 Proofs, 69.)

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The committee then proceed with an argument, based on this proposition, to prove that they have full power to act. Now, it is a common usage, in legislative bodies, to institute commissions to inquire into facts, and to report facts, as a basis of intelligent and wise legislation; but such a body cannot delegate to others its legislative discretion. The general conference could not, therefore, transfer to the Louisville convention the power to pass upon the very solemn question of a division and dismemberment of the church. They could, with equal propriety, have conferred this power on the bishops of the slaveholding conferences, or the presiding elders, or any designated number of ministers or laymen. This no one will insist could have been done.

This view may be applied in a two-fold aspect: First, as proving a lack of power in the Louisville convention to divide the church, so far as they professed to act under the authority of the general conference; and, Second, as raising a strong presumption that the general conference, by the action of 1844, did not divide the church, and did not intend to do so. It would be doing injustice to that most respectable body, to suppose they intended to delegate to others the exercise of a high function, pertaining to them as a legislative body.

But the inquiry remains, Do the acts of the general conference of 1844 justify the inference, that there was a serious purpose to divide the existing church, and from its dissevered parts, to create two distinct and independent churches? If this was intended, it is not unfair to suppose it would have been clearly and intelligibly expressed. It was a subject of the most momentous interest; and in passing upon it, it would occur to every one that nothing should be left to doubtful inference or construction. But, in looking into the proceedings of the general conference, in connection with the debates, no evidence is afforded that the body either asserted or attempted to exercise such a power.

That ever-fruitful source of agitation and excitement—the subject of slavery—in connection with the cases of Harding and Bishop Andrew, became a topic of discussion in the general conference of 1844. It is not, perhaps, uncharitable to suppose, that, even among the excellent and pious men composing this body, there was some excess of zeal and temper, and, consequently, some indiscretions, on both sides, during the long and animated debates which took place. There had been some previous causes of excitement and ill feeling, growing out of the alleged ultraism of some northern preachers, in connection with the question of slavery. And it is not strange that, from the collisions of a warm discussion of the subject, in the conference, some sparks of unholy fire should have been thrown off. As usual under such circumstances, the minority supposed they were oppressed by an imperious majority. Of course, there would be some alienation of feeling—some disruption of the holy ties of Christian brotherhood. In this state of things, the idea of a separation of the seemingly discordant elements took possession of some of the leading men of the south and south-western portions of the church. This idea was at length bodied forth in the form of a specific proposition, by Dr. Capers—now a bishop in the south, justly distinguished for his talents and his piety—who introduced a series of resolutions, the first two of which were as follows :

“ That we recommend to the annual conferences to suspend the constitutional restrictions which limit the powers of the general conference, so far, and so far only, as to allow the following alterations in the government of the church ; namely, That the Methodist Episcopal Church in these United States and Territories, and the Republic of Texas, shall constitute two general conferences, to meet quadrennially, the one at some place *south* and the other *north* of the line which now divides between the States commonly designated as free States, and those in which slavery exists.”

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"That each one of the two general conferences thus constituted shall have full power, under the limitations and restrictions which are now of force and binding on the general conference, to make rules and regulations for the church within their territorial limits respectively, and to elect bishops for the same."

It is not necessary to refer specially to the other resolutions in the series offered by Dr. Capers. The whole were referred to a select committee of nine, who were not able to agree on a report; and they were not afterward brought to the notice of the conference. It will be seen that the resolutions cited contained the distinct proposition to refer the question of the division of the church to the vote of the annual conferences; thus admitting a want of power in the general conference to authorize a division without a change in the constitution. As the matured opinion of a minister of the church, of high standing and great experience, this proposition of Dr. Capers is entitled to consideration. But also, it deserves notice, that this proposal, looking to a division of the church—clearly and explicitly stated—was allowed to drop without action; thus affording grounds for the conclusion, that, whatever other action it might be the purpose of the conference to take on this subject, they had no thought of a division of the church on the plan proposed. And there is room for the further inference, that upon a proposal to refer the question of dividing the church to the votes of the annual conferences, as the only constitutional mode by which it could be effected—if the power was understood to pertain to the general conference without such action—it is strange that no one was found to assert the power, and thus show the inutility of the proposed reference.

But looking at the "Plan of Separation," as adopted by the general conference, does it fairly import anything more than a proposition intended to open a way for the peaceful withdrawal of the southern and south-western conferences, should

they deem such a course expedient? The conference, it must be supposed, had in view the acknowledged right of any individual member, or any portion of the Methodist Episcopal Church to withdraw from its jurisdiction and government at their own pleasure. This right has been recognized from the earliest period of the church. Mr. Wesley distinctly avowed that it was formed on the voluntary principle; and that as no one joined his societies on compulsion, so no one would be required to continue in the connection, except by his own choice and volition. It was the understood law of the church, however, and the principle is clearly recognized in its discipline, especially in regard to ministers, that, while within the pale of its organization, strict obedience to her rules would be required. Ministers entered upon their solemn and self-denying duties with a knowledge of this principle, and also with a presumed reference to one of its sequences; namely, that if disconnected from the organized church, either by discipline or voluntary retirement, they forfeited all the privileges and benefits pertaining to them while within its pale.

Keeping this principle in view, the court will briefly examine the "Plan of Separation." It has been inserted in a previous part of this opinion, and need not be here set out. And it is to be remarked, in the first place, that throughout the entire "Plan" there is no pretense or claim of power in the general conference to divide the church, in the sense of creating from one church, two distinct and independent churches; nor is there any expression contained in it from which it is inferable that it was intended thus to divide it. And it cautiously guards against any admission of the necessity of a division. The first clause of the preamble refers to the declaration of the fifty-one delegates from the slaveholding conferences, representing that, for various reasons, "the objects and purposes of the Christian ministry and church organization cannot be successfully accomplish-

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ed by them under the jurisdiction of this general conference as now constituted." The second clause declares, that, "whereas in the event of a separation, a contingency to which the declaration asks attention as not improbable, we esteem it the duty of this general conference to meet the emergency with Christian kindness and the strictest equity." Here, it will be noticed, the separation is referred to as a "*contingency*"—something that *may* happen—and when it does happen, as producing an "*emergency*" to be met with Christian kindness. The first resolution provides, "that should the annual conferences in the slaveholding States find it necessary to unite in a distinct ecclesiastical connection," etc. Here again the language is exceedingly guarded, asserting no power, or intention to divide the church, and admitting no necessity for such division. It is perfectly intelligible without comment or exposition. Should the conferences referred to "find it necessary," upon mature consideration, to withdraw from the existing organization, then the conditions are prescribed on which the withdrawal is to be consummated; and provision is made for the continuance of future friendly relations with the proposed new organization. This was a jurisdiction undoubtedly possessed by the general conference, and which had been previously exercised in the case of the Canada conference. It was merely saying to their brethren of the south, If you decide on leaving us, it is our desire that we may part in peace. And in the exercise of a power clearly belonging to the general conference, they fixed upon certain rules which should govern the border conferences and societies; they declared that all ministers might, at their pleasure, attach themselves to the church south, if one should be formed, or *remain* in the Methodist Episcopal, without blame or censure; they agreed "that all the property of the Methodist Episcopal Church, in meeting-houses, parsonages, colleges, schools, conference funds, cemeteries, and of every kind, within the limits of the southern organiza-

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tion, shall be forever free from any claim set up on the part of the Methodist Episcopal Church, so far as this resolution can be of force in the premises." To this extent the general conference supposed they had rightfully the power to act. There was one subject, however,—the Charter Fund and Book Concern,—which was not within their control, except for a specific purpose ; namely, " The benefit of the traveling, supernumerary, superannuated, and worn-out preachers, their wives, widows, and children." This could not be appropriated in any way or for any purpose, other than that specified. In the fulfillment of the purpose declared, of meeting the " emergency" of a separation, should it happen, " with Christian kindness and the strictest equity," the general conference, therefore, referred it to the discretion and decision of the annual conferences, whether they would enlarge the power of the general conference, so as to enable it, by a vote of two-thirds of its members, to appropriate the Charter Fund and the Book Concern, as they might deem expedient ; and they provided the terms on which the division of the Book Concern should take place, in the event that the annual conferences should vote in favor of the proposed alteration in the sixth restrictive rule.

In all this there was certainly no claim of a power to divide the church by the direct action of the general conference, or of any right to delegate such a power to the southern conferences ; it was merely a provisional arrangement, to meet a " contingency" which it was declared might happen. The debates in the general conference are clearly confirmatory of this view. I may here, without any intended discourtesy, refer to a speech of Doctor William A. Smith, one of the complainants in this case—a minister distinguished by his gentlemanly deportment, his piety, learning, and intellectual power—made in Bishop Andrew's case, in which he insists, if certain doctrines are persisted in, " a division of our ecclesiastical confederation would become a high and solemn

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duty ; and adds, " This conference, I am aware, has no authority directly to effect this separation. *This subject must go back to the organic bodies we represent*—and to the people—the membership of the church—who must be consulted, and whose voice must be regarded as an authoritative decision, from which there is no appeal." In the debate on the " Plan," there seems to have been some diversity of view, in relation to its effect. Many of the speakers spoke, and, no doubt, voted, under a belief, that no part of the " Plan" could take effect, till the annual conferences had concurred in the proposed change of the sixth restrictive rule. Doctor Paine said, " The separation would not be effected by the passage of these resolutions through the general conference ; they must pass the annual conferences, beginning at New York ; and when they came round to the south, the preachers there would think and deliberate, and feel the pulse of public sentiment, and of the members of the church, and act in the fear of God, and with a single desire for his glory." Again : " They should be one people still, till it was formally announced by a convention of the southern churches, that they had resolved to ask an organization, in accordance with the provisions of the report." The same gentleman said, at another stage of the debate, " that the subject would go round, before it came to the south," etc. Doctor Luckey, in his remarks said, " He regarded the resolution as provisional and preliminary, settling nothing at present, but providing, in an amicable and proper way, for such action as it might be necessary hereafter to take. He hoped such necessity would never arise, and *that southern brethren would not find it necessary to leave them.*" Doctor Bangs said, " The speakers who have opposed the report have taken entirely erroneous views of it. It did not speak of division ; the word had been carefully avoided through the whole document ; it only said, in the event of a separation taking place ; throwing the responsibility from off the shoulders of the general

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conference, and upon those who should say such separation was necessary." Mr. Fillmore in his remarks said, "The resolutions do not say that the south must go, shall go, will go, or that anybody wants them to go; but simply makes provision for such a contingency." Mr. Finley said, "He could see in the report no proposition to divide the church; if he saw such a proposal, he should stop at the threshold." Mr. Hamline argued against the necessity of referring all the resolutions embodied in the report of the committee, to the annual conferences, insisting that it was only necessary to refer that relating to the sixth restrictive rule; and saying, "The Book Concern is chartered in behalf of the general Methodist Episcopal Church of the United States; and if they did separate till only one State remained, still Methodism would remain the same, and it would still be the Methodist Episcopal Church in the United States." Again: "If they sent out to the annual conferences to alter one restrictive rule, [the sixth,] it would be constitutional to divide the Book Concern, so that they might be honest men and ministers. The resolution goes on to make provision, if the annual conferences concur, for the security and efficiency of the southern conferences." And, continuing, he said, "God forbid that they should go as an arm torn from the body, leaving the point of junction all gory and ghastly." The same speaker also said, remarking on the action of the committee, "They had carefully avoided presenting any resolution which should embrace the idea of separation or division." Mr. Porter said, "The committee had presented that report as the best thing that could be done under the circumstances." Again: "If there were defects in the document, they could arrest it in the annual conferences. The south could take no action upon it, till the annual conferences had decided respecting the sixth rule; and if, when they got home and calmly and deliberately examined it, they found

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anything radically wrong, let them stop it in the annual conferences."

Without extending these quotations, it will be seen that, in the debate on the "Plan of Separation," the idea was promptly repelled, that in its adoption the general conference was giving its sanction to a division of the church; and that, so far from showing such an intention, all expressions justifying the inference were cautiously avoided in the "Plan" itself. It seems also clear, that the conference designed to act expressly on the principle avowed by Doctor Bangs, of "throwing the responsibility from off the shoulders of the general conference, and upon those who should say such separation was necessary."

It is equally clear, that the proceedings of the Louisville convention do not warrant the conclusion, that they supposed the church was divided by the action of the general conference, or by the joint action of the latter body and the convention, as claimed by the bill in this case. The convention, it may be remarked, was not a body known to, or recognized by, the constitution of the church. Neither had it been called under the sanction or authority of the general conference; nor was that conference in any wise responsible for its doings. The "Plan of Separation" prescribed no mode by which the conferences of the slaveholding States should decide the question of the necessity of their withdrawal. The general conference had no right to do this, and did not assume to do it. It was left wholly to the choice and discretion of the south. It was decided to call a convention at Louisville; and this body declared "that it is right, expedient, and necessary to erect the annual conferences represented in this convention into a distinct ecclesiastical connection, separate from the jurisdiction of the general conference, as at present constituted." It was also declared, "that the jurisdiction hitherto exercised over said annual conferences, by the general conference of the Methodist Epis-

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copal Church, was *entirely dissolved*," and that such annual conferences should be formed into "a separate ecclesiastical connection, to be known by the style and title of the Methodist Episcopal Church South." Provision was also made for a general conference of the Southern church, at Petersburg, on the 1st of May, 1846, and quadrennially thereafter. These proceedings perfected the act of separation, or withdrawal—a result not brought about by the act of the general conference of the Methodist Episcopal Church, but by the decision of the Louisville convention.

There is no ground for the charge that there was any concealment or unfairness in the conduct of the general conference of 1844. There is no difficulty in comprehending their motives and their actions. The vivid representations of southern ministers, that unhappy consequences would result in the south from the decisions of the general conference in some matters connected with slavery—evils not then experienced, but apprehended,—induced that body to adopt such measures as were within its constitutional competency, to meet the threatened emergency, and mitigate, as far as practicable, the painful results likely to ensue from the withdrawal of the southern conferences. This result was, no doubt, deemed probable; and, when it should happen, the laudable desire was evinced that it should take place without the total disruption of the ties of Christian brotherhood. The right of withdrawal was unquestionable, and was distinctly admitted by the north. There was but one barrier that stood in the way of this movement; and that was the constitutional difficulty of a division of the Chartered Fund and the Book Concern. This the conference was willing to remove, in the only mode by which it could be constitutionally effected. That body was expressly prohibited, by the sixth restrictive rule, from making any apportionment or division of these funds and property, except as prescribed by that rule, without authority from the annual conferences. A proposi-

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tion was, therefore, submitted to these conferences for a modification of this rule, with a view to enlarge the powers of the general conference. They refused to concur in the proposed change, and this negative upon that measure left the general conference without any power further to act in the matter, except upon some future proposition of compromise. The southern members were fully apprised of the difficulty adverted to, and a portion of them, evidently, were of the opinion that the entire "Plan of Separation" depended on the action of the annual conferences, on the question of changing the sixth restrictive rule. In their address to the southern churches, the delegates from the south, in the general conference of 1844, instead of censuring that body for its action on the property question, bear honorable testimony to "the spirit of justice and liberality" of the north, and say, "That should a similar spirit be exhibited by the annual conferences in the north, when submitted to them, as provided for in the 'Plan' itself, there will remain no legal impediment to its peaceful consummation."

On this state of facts, the inquiry is presented, whether this court, in the exercise of its equity jurisdiction, can rightfully take charge of the property and funds of the Book Concern, as a charity, and apportion them ratably among the parties to this controversy.

If the position were sustainable that the Methodist Episcopal Church has been legally and constitutionally divided into two separate and independent churches, it would result necessarily that the old church is annihilated; and, not being an existing organism, can have no capacity to hold or administer the charity in question; and, in that aspect, there can be no doubt that a Court of Chancery, on the doctrine of *Cy. pres*, could rightfully take jurisdiction and dispose of the charity, as nearly as possible, in conformity with its original purpose. On this supposition, the beneficiaries within either of the two church organizations would be placed on the same

footing. They would have precisely the same rights, and would be equally without any of the requisite means to enforce them; for the agencies by which alone the charity could be administered would be destroyed with the demolition of the original church to which they pertained. But this hypothesis is clearly not admissible. It needs no process of reasoning to show that the Methodist Episcopal Church is not destroyed. It still exists in name and organization, as it did prior to 1844. From that time to the present, it has been going forward in the discharge of its accustomed duties and functions. It has had, and still has, its bishops, its preachers, its membership, and a regular succession of its general, annual, and quarterly conferences. In short, the entire machinery of its organization has been in full operation to this day. True, the withdrawal of the southern conferences has lessened the number of its members, and curtailed its territorial jurisdiction; but it is undeniably the same church—the Methodist Episcopal Church—having all the essential elements of identity with the church prior to 1844. This great ecclesiastical organism, has not, since that time, wrought its own destruction; nor has it been destroyed by any power or influence, *ab extra*. As the keeper of the charity in question, it has now the same power to hold, and precisely the same agencies to administer it, that it ever had. It has also beneficiaries capable of receiving and entitled to its benefits. In a word, its machinery is perfect in all that is required to manage and distribute the charity, according to the purpose of its creation.

What is the position of the complainants in reference to this charity? In so far as they may be understood, from the bill, to claim a decree on the ground of their individual interests in the Book Concern, as belonging to the traveling connection, or as supernumerary or superannuated preachers, an insuperable objection seems to present itself. The legal nature of their interests, as individuals belonging to the one or

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the other of these classes, is not such that it can form a basis for a decree in their favor. The beneficiaries of this charity, as individuals, have no legal right to or interest in the fund. They have an inchoate right ; but not such a one as can be recognized in law or equity. It is not capable of transfer or alienation. It bears no similitude to a co-partnership, a retiring member of which may call upon his associates for an account, and claim his specific proportion of the partnership fund or property. It is not every one, falling within the class of traveling, supernumerary, or superannuated preachers, or the wife, child, or widow of such, that is necessarily a beneficiary of this church charity. It can only be available to them under certain circumstances. It is only when it is made to appear to the proper annual conference, that after applying the contributions required by the law of the church, to be raised for the support of these persons, there is a deficiency for this purpose, that they are entitled to assistance from the proceeds of the Charter Fund or the Book Concern ; and then only for the amount of such deficiency. If, therefore, in any conference, the liberality of the people or membership is such, that means sufficient for the support of the beneficiaries of the general charity are raised, nothing is, or can be, drawn from it for that purpose ; and all the inquiries to ascertain the fact of deficiency and its amount are made through the agency of the several annual conferences, who, upon the direction of the general conference, are the distributors of the charity, and deal it out to the individual beneficiaries as they show themselves entitled to it.

But if these complainants, and those they represent—forming the entire class of the beneficiaries within the Southern church—having, as the bill assumes, an interest in this great charity, and averring that they have presented their claim to their just apportionment of it, and that such claim has been rejected ; or, if they can show that the fund has been diverted from its rightful object, or that those intrusted with its

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administration have conducted dishonestly or in bad faith, a ground is afforded for the interposition of a court of equity, in virtue of its acknowledged jurisdiction over charitable uses. But it will be obvious, that it is necessary that the claimants of the charity should make it appear that they are within the class of its beneficiaries. Now, in the present case, as has been already stated, the complainants, and those they represent, base their claim on the fact that they were once in connection with the Methodist Episcopal Church, as traveling, superannuated, or supernumerary preachers, and are now, by the means and proceedings stated, within the Methodist Episcopal Church South, and, that in virtue of that ecclesiastical connection, are rightful beneficiaries of the charity in question. In the view of this court, as the result of its best judgment upon the legal import of those measures and proceedings, these complainants, in the exercise of their undoubted right, have withdrawn from the Methodist Episcopal Church by their own act and volition, and now belong to another ecclesiastical organization—holding, indeed, the same faith, but in every other respect distinct from, and independent of, that from which they have retired. And this presents the question, whether they are now to be regarded as belonging to the class of beneficiaries, having a rightful claim to a participation in the charity under consideration. This question, of course, presupposes the fact, undeniable in this case, that the sixth restrictive article of the constitution of the church is in full force; the annual conferences not having enlarged the power of the general conference so as to permit the appropriation of the proceeds of the Book Concern to any other purpose, or in any other way, than that prescribed by the organic law of the church. The inquiry, then, reduced to its simplest elements, is, whether any one not within the pale of the organized Methodist Episcopal Church, can be a beneficiary of the charity referred to. It is not intended to enter on the wide field of investigation

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which this subject presents, but very briefly to state the conclusions to which the court has arrived.

The origin and nature of this charity have been already set forth. That its benefits were designed exclusively for those who continue within the organized Methodist Episcopal Church, seems to be a conclusion inevitable from the polity of the church, and also from its usages. It has been before noticed, that the voluntary principle, in its greatest latitude, both in regard to admissions into the church, and retirement from it, has always been an acknowledged and favorite principle with this church. Any one—preacher or private member—has the right to withdraw from the church at any time; but upon such withdrawal he abandons all right to property which pertained to him as a preacher or member. No one controverts this principle, as applicable to an individual. Every year there are more or less of the traveling preachers who withdraw from the connection; and cases also occur of their expulsion for misconduct. In either case, they forfeit all claims to a participation in the charities of the church. The same principle applies where large numbers go off in a body, or where a conference, or any number of conferences secede. It does not vary the principle, that those thus seceding attach themselves to another ecclesiastical organization, holding the same faith as the church from which they retire. They are no longer in the Methodist Episcopal Church, of which the charity, known as the Book Concern, is an appendage, and *for* which it was created. Upon any other principle, in the case under consideration, there could have been no necessity for asking the annual conferences to modify the sixth restrictive rule. It would have been competent for the general conference to have appropriated the produce of the Book Concern to the preachers of the Church South without a change of that rule, if they could be viewed as beneficiaries after their withdrawal from the old organization. This view is strongly sustained

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by the fact before noticed, that the law of the church affords no rule by which the charity can be dispensed to those not in connection with some annual conference. It is only through the agency of the annual conferences that the fund can reach its beneficiaries. This view does not, of course, preclude the general conference, in cases within its just constitutional power, from making provision, by compact or compromise, for securing the just rights of withdrawing members or sections of the church.

This was the doctrine distinctly avowed and acted on in the case of the Canada conference. After its withdrawal from the Methodist Episcopal Church, an application was made to the general conference by that conference, for its ratable proportion of the produce of the Book Concern. It was held by the general conference that there was no authority in that body to authorize such a use of this fund. The question was submitted to the vote of the annual conferences; and such was the prevailing sentiment of the church, that the Canada conference, by its withdrawal, had forfeited all claim to this charity, that the vote was largely against their application.

It is, however, strenuously urged by the counsel for the complainants, that the withdrawal of the southern conferences, is justified on the ground of necessity; and that they cannot be viewed as having voluntarily separated from the Methodist Episcopal Church. It is insisted that the previous agitation and discussion of the subject of slavery, and the state of feeling in the northern portion of the church in relation to it, in connection with the proceedings of the general conference of 1844, in the cases of the Rev. Mr. Harding and Bishop Andrew, involved the necessity of a separation. In the report of the Committee on Organization, adopted by the Louisville convention, the committee, after claiming ample authority to organize a new church in virtue of the power conferred by the general conference in the "Plan of Separa-

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tion," assume that there exists " a high moral necessity for the measure." The complainants, in their bill, set forth the subject as follows : " That differences and disagreements having sprung up in the church, between what was called the northern and southern members, upon the administration of the church government, with reference to the ownership of slaves by the ministers of the church, of such a character, and attended with such consequences as threatened fearfully to impair the usefulness of the church, as well as permanently to disturb its harmony; and it became, and was, with the members of the church, a question of very grave and serious importance, whether a separation ought not to take place, with some geographical boundary with necessary and proper exceptions, so as that the Methodist Episcopal Church should constitute thereafter two separate and distinct Methodist Episcopal Churches." This is the only statement in the bill of the difficulties connected with the subject of slavery. There is no specific reference to the action of the general conference, in the two cases mentioned, as affording the ground of the alleged necessity of separation; nor does the bill ask for a decree on the basis of the unavoidable withdrawal of the south as induced by that action. It is, perhaps, questionable whether, if the court should be of opinion that there was a necessity for the separation, a decree in the case could properly be based on that fact.

But, without delaying to consider this point, it may be asked, Do the facts in proof make out a case establishing the necessity of the withdrawal of the south, in the sense of taking from them the character and designation of seceders? Of course, this question must be dealt with in its legal aspect and bearings, as affecting the rights of the parties to this suit. It is easy to conceive of a state of things which might, in the opinion of well-balanced and pious minds, render it expedient and morally proper that the south should

withdraw, which, however, would not involve a positive or legal necessity.

In the view entertained by the court, there will be no occasion, in disposing of the point under consideration, to give a construction to the various provisions of the discipline of the Methodist Episcopal Church on the subject of slavery, intended, as far as practicable, to disconnect the ministry from holding slaves. There is no question, that while the position of that church, from its origin in this country, has been generally wise, rational, and conservative on the subject of the institution of slavery, it has never ceased to bear testimony against the owning of slaves by the ministry. The legislation in the slaveholding states,—especially the stringent laws passed in the most of them prohibiting emancipation,—led, in 1840, to the modification of the rule, so that the holding of slaves in States where such a law was in force, should not be a disqualification for any official station in the church. This was, in substance, the law of the church in 1844. The general conference of that year had before it the two cases before named. Mr. Harding, a traveling preacher in the Baltimore conference, had become the owner of slaves by marriage. He was cited to answer for a violation of the law of the church for this act. The Baltimore conference, upon hearing the case, entered a judgment of suspension against him. He appealed to the general conference, and in that body the judgment of the annual conference was affirmed.

Bishop Andrew, after his election, had also become the owner of slaves,—one by testamentary bequest, and one by marriage. In the northern portion of the church there was a decided feeling of dissatisfaction toward the Bishop, arising solely from his connection with slavery; and a belief was prevalent that he had wounded the church thereby, and violated the spirit, if not the letter of its law on this subject. By the discipline of the church, a bishop is declared to be

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amenable to the general conference for improper conduct. The general conference of 1844 held, that under this clause in the discipline, it was competent to inquire into the fact alleged against the Bishop. He was present at the conference, and made a full and candid statement of all the facts connected with his ownership of slaves. After a protracted discussion of the subject, the conference adopted the following preamble and resolution :

"Whereas, the discipline of our church forbids the doing any thing calculated to destroy our itinerant general superintendency ; and whereas, Bishop Andrew has become connected with slavery by marriage and otherwise, and this act having drawn after it circumstances which, in the estimation of the general conference, will greatly embarrass the exercise of his office as an itinerant general superintendent, if not in some places entirely prevent it ; therefore,

"*Resolved*, That it is the sense of this general conference that he desist from the exercise of his office, so long as this impediment remains."

On a subsequent day of the session, the conference adopted the following resolutions explanatory of the foregoing :

"*Resolved*, As the sense of this conference, that Bishop Andrew's name stand in the Minutes, Hymn-Book, and Discipline as formerly.

"*Resolved*, That the Rule in relation to the support of a Bishop and his family applies to Bishop Andrew.

"*Resolved*, That whether in any, and if in any, what work Bishop Andrew be employed, is to be determined by his own decision and action in relation to the previous action of this conference in this case."

As before remarked, it is not designed to follow the counsel in their elaborate discussion of the question, whether the general conference, in the disposition made of these cases, have acted erroneously. I have not been able to perceive the materiality of this question as connected with the legal

rights of the parties to this controversy. If it be admitted that the general conference of 1844 acted under a misapprehension of the law of the Church in relation to the holding of slaves by a minister or bishop, or mis-judged as to its constitutional authority to take cognizance of the cases referred to, does it furnish a justifying reason for the secession of any portion of the Church? This inquiry is not made with any view to the admitted right of voluntary withdrawal from the Church, whether with or without cause, but merely in reference to the ground assumed, that in this case it became a matter of necessity. It would seem that the southern portion of the Church, claiming to be aggrieved by these proceedings, did not regard them as sufficient in themselves to justify secession on the ground of necessity; and hence, the proposition for a division was laid before the general conference for its consideration and sanction.* But let us inquire if, upon any just principles, the withdrawal of the south admits of vindication, in the sense referred to. In the case of Mr. Harding, in a proceeding, understood to be judicial in its character, originating in the annual conference in which he was a traveling preacher, the general conference affirmed the judgment of that body, by which he had been suspended from the ministry. The case was clearly within the jurisdiction of the general conference, as the highest appellate judicatory of the Church; and there is no pretense for insisting that in this judgment that respectable body of ministers were governed by any corrupt or improper motives. If they erred in their conclusions upon the law or facts of the case, no other presumption is allowable than that it was an error of judgment; a species of error, it may be remarked, to which all human tribunals are liable, and of no uncommon occurrence.

The case of Bishop Andrew involved the exercise of the legislative power of the general conference. That body adopted a resolution, by a large majority, expressive of its opinion, that under the circumstances of the case, it was

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expedient that the Bishop should cease to exercise the duties of his office, till relieved from the impediment which, in its judgment, his connection with slavery had created. This, it will be noticed, was not a judicial sentence, but a mere legislative declaration of the sense of the conference on a question of expediency, and subject to rescission by any succeeding conference. There is nothing, either in the preamble or resolution, imputing crime or immorality to the Bishop, or in any way impeaching his standing or character as a Christian, except in the estimation of those who hold that the ownership or holding of slaves, under any conceivable circumstances, involves moral turpitude. It appears, as well from the preamble to the resolution as the debates on the occasion, that the majority were not influenced so much by a conviction of the positive wrong of the Bishop's conduct, as the apprehension that, in the position in which he had placed himself, he could not usefully and acceptably perform the duties of his high office. The principle of itinerancy, as applicable to ministers and bishops, lies at the foundation of the Methodist polity; and from the days of Wesley has been regarded as indispensable to the accomplishment of the great purpose for which the Church was instituted. The bishops are required by the Discipline to travel through the entire territorial limits of the Church. The preamble to the resolutions adopted in Bishop Andrew's case refers to this, and expresses the apprehension that his connection with slavery "will greatly embarrass the exercise of his office as an itinerant General Superintendent, if not, in some places, entirely prevent it." There seems to have been nothing in the proceedings evincive of personal unkindness to the Bishop, or a want of confidence in his piety as a Christian minister. Nor can the resolution first adopted be fairly construed as importing a sentence of deposition against him. If there was room for a doubt as to the intention of the general conference in this respect, it is removed by the explana-

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tory resolutions subsequently passed, declaring that he was still to be regarded as a Bishop, with the full right, at his own option, to continue in the discharge of his usual official duties.

In this country there is no connection between Church and State. As the result of this happy disseverance, it is the right of all men freely to choose such Church association as they prefer; and when within the pale of a Church organization, they can adopt such rules of discipline and government as may best suit their own views, subject to this limitation, that they are not in violation of the national or state laws. The civil government claims no right, and clearly possesses none, to interfere with or supervise the doings of any ecclesiastical body, except as they may be involved in a judicial case, in which rights of property are drawn in question. And it is only in this view that this court can take cognizance of, or adjudicate on, the matter now under consideration.

There can be no doubt that an ecclesiastical judicatory may so clearly and palpably overleap its just constitutional limits, and so grossly infringe the rights of an individual or a minority, as to render it expedient and necessary that they should withdraw from its jurisdiction. And when such withdrawal is unavoidable, from the pressure of necessity, it would be unjust that those who are driven to this course, should be deprived of any of the rights of property to which they were entitled before secession. But to save such rights, seceders will be required to make out a clear case of necessity. And upon such an issue, involving the actions of a body of men who may well be supposed to be governed by the promptings of a pure benevolence, and to have adopted the teachings of the word of God as their rule of action, no unfavorable presumption as to motive can be entertained.

It is not proposed, in entering on the inquiry, whether the action of the general conference brings the withdrawing con-

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ferences of the south and south-west within the principle before stated, to review minutely the facts, which, it is alleged, left them no other course but separation from the Methodist Episcopal Church. Prior to the year 1844, there had been some abolition movements in portions of the north, which were probably indiscreet and uncalled for. In 1842, a large body of northern Methodists seceded, on the ground that the Methodist Episcopal Church was too lax in its discipline in regard to the ownership of slaves by ministers and members. It was not, however, till the meeting of the general conference of 1844, that any thing occurred, affording a specific ground of complaint to the south, and which threatened seriously to disturb the harmony so long existing between it and the north. In their public acts and declarations, the southern members specify, as their grounds of complaint, the proceedings of the general conference in the cases of Harding and Bishop Andrew. It was not claimed that there had been any previous action of that high judicatory indicating a purpose of infringing or trampling upon the rights of the southern portion of the Church, or foreshadowing the necessity of severance. The inquiry, then, may be narrowed down to this, namely: Did the action of the general conference, in the two cases noticed, afford such a necessity for secession as will save to those who leave, their previously-existing interest in and claim to, the charities or property pertaining to the Church? In deciding this point, the court, as before intimated, is not aware of the necessity of a critical examination of the law and the facts in the cases passed upon by the general conference, with a view to determine whether the proceedings were erroneous or otherwise; for it seems to the court quite immaterial whether, in the one case, that body erred in affirming the judgment of suspension against Mr. Harding entered in the lower court, or, whether, in Bishop Andrew's case, they improperly exercised their legislative power. Suppose they were wrong in both

cases : was a crisis produced, calling for and requiring immediate measures for a secession on the basis of necessity ? It is very far from the purpose of the court, to impeach the motives, or in any way to censure the eminent and pious men of the south who thought it to be their duty to encourage the measure of withdrawal. It is not intended to affirm or insinuate that they may not have had a deep-seated and earnest conviction of the truths they so eloquently and impressively made known to the world, as to the cause of the movement. There is no reason to doubt that they sincerely believed the best interests of religion demanded it ; and they may stand acquitted of any wrong before him who is the Searcher of hearts. But this still does not make out the case of an involuntary or compulsory secession, in the sense already stated ; nor does it establish the position that their rights had been willfully outraged and the constitution so palpably violated as to make it a necessity that the south should secede. It may have afforded, in their judgment, a fitting occasion for the exercise of their unquestioned right to withdraw from the Church at their pleasure ; but it does not prove that the withdrawal took place under circumstances that justify the conclusion that they are out of the Church by an unavoidable necessity, caused by the wrong action of the general conference. This position must be made out, in order to place these complainants on the footing which they claim rightfully to occupy in this case. For this court is unwilling to give its sanction to the principle, that an error of judgment—if it be assumed that the general conference has erred—in a case where it had jurisdiction, and in the absence of any semblance of corrupt or improper motive, whether in the exercise of its judicial or legislative power, affords a just cause, a legal necessity, for secession by those supposing themselves to be aggrieved. I do not propose to attempt the discussion of the principle here involved ; though it might be profitable, under other circumstances, to examine it. It is

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enough to say, that the practical recognition of the right of secession or revolution, on such a ground, whether applied to civil or ecclesiastical governments, must inevitably lead to a condition of anarchy, fatal to the existence of every thing like order and stability. Its baneful tendencies are too obvious to need illustration.

As the result of the views I have attempted to present, it follows :

1. That the general conference of the Methodist Episcopal Church is a delegated or representative body, with limited constitutional powers ; and possesses no authority, directly or indirectly, to divide the Church.

2. That in the adoption of the "Plan of Separation" in 1844, there was no claim to, or exercise of, such a power.

3. That as the general conference is prohibited from any application of the produce of the Book Concern, except for a specified purpose, and in a specified manner ; and as the annual conferences have refused to remove this prohibition, by changing or modifying the sixth restrictive rule, the general conference has no power to apportion or divide the Concern or its produce, except as provided for by said rule.

4. That said Book Concern is a charity, devoted expressly to the use and benefit of the traveling, supernumerary, and superannuated preachers of the Methodist Episcopal Church, their wives, widows, and children, continuing in it as an organized Church ; and, any individual, or any number of individuals, withdrawing from, and ceasing to be members of the Church, as an organized body, cease to be beneficiaries of the charity.

5. That it is the undoubted right of any individual preacher or member of said Church, or any number of preachers, or members ; or any sectional portions or divisions thereof, to withdraw from it, at pleasure ; but in withdrawing, they take with them none of the rights of property pertaining to them, while in the Church ; and, that the with-

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drawal of the southern and south-western conferences in 1845, being voluntary, and not induced by any positive necessity, is within the principle here stated.

6. That the defendants, as trustees or agents of the Book Concern, at Cincinnati, being corporators under a law of Ohio, and required, by such law, "to conduct the business of the Book Concern in conformity with the rules and regulations of the general conference," in withholding from the Church South, any part of the property or proceeds of said Book Concern, have been guilty of no breach of trust, or any improper use or application of the property or funds in their keeping.

7. That this is not a case of lapsed charity, justifying a court of equity in constructing a new scheme for its application and administration; and that the complainants, and those they represent, have no such personal claim to, or interest in, the property and funds in controversy, as will authorize a decree in their favor, on the basis of individual right.

There are some points made by counsel, which, not being regarded as material in the decision of the case, have not been specially noticed.

It now only remains for me to say, that it was with some reluctance and self distrust, that I entered upon the investigation of this controversy; and, although the conclusions to which I have arrived, have been satisfactory to myself, I experience the highest gratification from the reflection, that if I have misconceived the points arising in the case, and have been led to wrong results, my errors will be corrected by that high tribunal, to which the rights of these parties will, without doubt, be submitted for final adjudication.

[The decree dismissing the bill was reversed on an appeal to the Supreme Court, December term, 1853.]

Lessee of H. O. Hotchkiss v. Glasgow et al.

LESSEE OF H. O. HOTCHKISS v. GLASGOW ET AL.

A deed, fair upon its face, is not objectionable, as a colorable conveyance to give jurisdiction, unless proof be shown aliunde.

A certified copy of a deed, not authenticated by the seal of the recorder, is not admissible in evidence.

Mr. Taft appeared for plaintiff.

OPINION OF THE COURT.

To sustain the title a deed was offered for the premises from Nathaniel Sawyer to Hotchkiss, which was objected to, as the conveyance was only colorable, to give jurisdiction to the court. Hotchkiss is the son-in-law of Sawyer. The consideration named in the deed is the sum of ten dollars.

The court held the deed was good upon its face, as between the parties. In his correspondence with the counsel (Mr. Taft), Mr. Hotchkiss claimed the land as his own.

A patent was then offered to John Lee and Rebecca Greenwood. A deed was then offered from the heirs of Lee to Nathaniel Sawyer, and proof was given that the grantors were the heirs of Lee. A patent to Sawyer and Baylor was then read in evidence. A proceeding was then read in chancery, decreeing the title of Baylor's heirs to Sawyer. A deed, dated 18th June, 1839, was then read from Rebecca Greenwood to N. Sawyer.

The copy of the original deed from R. Greenwood, was offered, certified by the recorder, but not authenticated by the seal of that officer. The court held that the copy was not authenticated as the statute required, and a non suit was, consequently, suffered.

A motion to set aside the non suit was submitted, but the court overruled the motion.

SAMUEL WORKS v. THE JUNCTION RAILROAD.

A citizen of another State owning property in this State, has a right to come into the Circuit Court of the United States, asking for an injunction to restrain the acts of a corporation, incorporated under the laws of Ohio, which, if consummated, would do irreparable injury to his property situated here.

A private person cannot apply to a court of chancery to prevent or remove a public nuisance, which does him no special injury. But he may, if the nuisance is immediately injurious to himself, although it may also affect the public. A private person owning a tannery, flour mill, saw mill, stores and warehouses, a wharf and water lots, and stock in a plank road leading from the town where they are situated, which is upon a river navigable for steamboats, schooners, and other vessels, and from which trade is carried on with other ports, in which he participates, may injoin a railroad company from obstructing the navigation of the bay into which that river empties, when such obstruction will materially injure the trade of that town.

From the nature of such an injury, its extent cannot be ascertained with precision. It is permanent; consequently suits at law for relief must be endless. To establish a wrong of this nature, it need not be measured by dollars and cents. It must be shown to exist; it must be material; but the particular amount of damages can not and need not be shown. In such cases, adequate relief can be given only by injunction.

Where the termini of a railroad are fixed by its charter, and an amendment is made thereto authorizing the company "to extend its line of railroad to a point on a river" named, which is beyond the original terminus and not in a direct line with the termini, the company are not authorized in departing from one terminus named, and constructing a direct line between the other terminus and the point designated on the river, which will leave the original point of termination entirely out of the line of the road. The extension of a line does not authorize a departure from it in the middle or any other part of it, except from its terminus.

Where a railroad company was authorized by its charter "to construct branched roads from the main route, to other towns or places in the several counties through which the road might pass," they are limited to the construction of branch roads, which leave the main route and terminate at some town or place within the same county as that in which the other terminus of the branch is situated. The construction of a line of road, commencing in one county and terminating in another, is not authorized by such a provision.

A railroad company was authorized to construct a railroad, making S. and F. points in the main line. They proceeded to put under construction a line from S. to P., which lies thirty-eight degrees north of a direct line from S. to F., and which, if brought down to that line, would not be half way between S. and F.

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The court considered that this was manifestly intended to be the main line, and could not be called a branch.

A right to change a location, "either for the difficulty of construction, or of procuring a right of way at a reasonable cost, or whenever a better and cheaper route can be had," does not authorize a company to relocate, because a particular town, on the selected route, will not contribute to the road. Nor will it authorize a departure from the points named in the charter.

The right to cross a navigable water by a railroad bridge, must be given by the sovereign power, by a special or general act. Where this is not done, neither the Board of Public Works, nor an Acting Commissioner of that Board, can approve of the structure of a bridge over it. No such power is given by the twentieth section of the act of Ohio of May 1, 1853, to provide for the creation and regulation of incorporated companies, 3 Curwen's Revised Statutes, page 1892,

By the twentieth section of that act (3 Curwen's Revised Statutes, 1892), either the Acting Commissioner of the Board of Public Works, within whose territorial jurisdiction the work is to be erected, or the Board of Public Works may approve of the *plan* or *structure* of a proposed bridge over a navigable water; and as the law has provided for no appeal from the decision of the Acting Commissioner, his favorable decision is final. A reversal of that decision by the Board is a nullity, they having no jurisdiction over the subject.

The expression, "The Acting Commissioner having charge of the public works where such crossing is proposed," in the twentieth section of the act alluded to (3 Curwen's Revised Statutes, 1892), means nothing more than that such place shall be within the *territorial* jurisdiction of the Commissioner. It does not mean that the water over which the bridge is proposed to be erected, should be a portion of the public works of Ohio. The words "navigable waters" are used in no such restricted sense; they embrace and were intended to embrace, all waters within the State, which are navigable by the works of art or nature.

Where a company is authorized to construct a railroad between two points, "over" a navigable water, a right to construct a bridge over that water is implied, as a necessary means of carrying into effect the power granted.

Under the power to regulate commerce, Congress have power to prevent the obstruction of any navigable river, which is a means of commerce between any two or more states. The exercise of this great public right is not incompatible with the enjoyment of local rights. The public right consists in an unobstructed use of a navigable water connecting two or more States. The local right is to cross such water. The general commercial right is paramount to all State authority.

A public nuisance can not be tolerated on the ground that the community may realize some advantages from its existence. The doctrine on this subject, as it is stated in the Wheeling Bridge Case (9 Western Law Journal, 535), adopted and followed.

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A draw-bridge over navigable water, although it unavoidably occasions some delay in passing it, is not necessarily such an obstruction to the navigation as to amount to a nuisance. The delay is submitted to in consideration of the benefits conferred.

In considering whether a draw-bridge is an obstruction, the unskillfulness of the seamen, and the probability of men not being ready at the draw to open it, are to be laid out of consideration. The law presumes that what ought to be done will be done, and that since seamen should be skillful, they will be so.

When the chancellor is asked to restrain the erection of a bridge, on the ground that it will be an obstruction to the navigation, and the testimony offered to prove it so, is so nearly balanced as not to incline the scale on either side, the extraordinary and preventive power of an injunction, which may be ruinous to one of the parties, ought not to be exercised.

OPINION OF THE COURT.

The complainant, a citizen of New York, states that he owns a large amount of real estate at and near Fremont, on the Sandusky river, in the county of Sandusky, state of Ohio, which comprises a tannery, half of a flouring mill, saw mill, a store and warehouses, a wharf and water lots; that the Sandusky river from Fremont is navigable for steamboats, schooners and other vessels, and that a commerce is carried on from it, down the river and bay to different ports on the lakes; that he has plank-road stock which pays a profit by the transportation of produce to and from Fremont; and that shipments are made of flour and lumber from his mills, and leather from his tannery, etc.

He represents that the defendants are about constructing a railroad from Sandusky city to Toledo, crossing the Sandusky bay by a bridge on a line to Port Clinton, in Ottawa county; that the bridge, if made, will materially obstruct the commerce of the bay to his individual and irreparable injury, and he prays for an injunction to restrain the defendants from the construction of their proposed bridge.

The "Junction Railroad Company" answers that it is engaged in building a railroad between Cleveland and the Maumee river, connecting with Toledo, and extending from

that city to the west line of the State, under various charters which authorize them to prosecute the work.

The Port Clinton Railroad Company demurs generally to the complainant's bill, and answers, denying the fraud and collusion with the Junction Railroad, as charged in the bill. It denies that it has any connection with the Junction Railroad, either to aid it or receive aid from it.

The navigableness of the Sandusky bay above the proposed bridge, and also of the Sandusky river to Fremont, is admitted by the parties and the pleadings. The general government has recognized this fact by making Fremont a port of entry, and the State of Ohio, by appropriating funds in removing certain obstructions in the Sandusky river.

Has the complainant a right to prosecute this suit? If the proposed bridge shall be an obstruction, as charged in the bill, it will be a public nuisance. No individual can complain of such a structure, unless his interests are injuriously affected by it. In such case it is a private nuisance to him, and if at common law he can obtain no adequate remedy, he may seek relief by injunction.

The complainant's citizenship gives him a right, in ordinary cases, to prosecute a suit in this court. But to maintain this suit, he must superadd a private injury which is irremediable at common law. Has this been shown? I think it has. From the property owned by the complainant, from the different kinds of business in which he is engaged, it appears that any material obstruction to the commercial outlet from Fremont must injuriously affect his interests. The product of his mills, his wharf, his grounds on the river, are enhanced in value by an unobstructed commerce. His road stock is more or less affected by the transportation of freight to and from Fremont. The injury from the obstruction, if it be material, affects directly the articles shipped, and indirectly tends to lessen the value of the operating means through which these articles are produced or acquired.

If such injury exist, no adequate remedy can be found by an action at law. From the nature of the injury, its extent can not be ascertained with precision. It is permanent; consequently the suits at law for redress must be endless. In such a case, adequate relief can be given only by injunction. It prevents the wrong. To establish this wrong, it need not be measured by dollars and cents. It must be shown to exist; it must be material; but the particular amount of damage can not and need not be shown. A mischief being proved, which can not be redressed at common law, connected with the citizenship of the plaintiff, establishes his right *prima facie* to prosecute this suit. The right to prosecute being shown or admitted, the nature and extent of the nuisance may be examined. The extent of the commerce obstructed may be proved, and also the dangers and probable losses to which it will be subjected.

The complainant having maintained his right to sue, the defendants are thrown upon their defense. This they have attempted to make, by giving in proof the act incorporating the "Junction Railroad Company," with its various amendments, and also the incorporation of the Port Clinton company.

The charter of the "Junction Railroad Company" was granted the 2d of March, 1846. The second section authorizes it to construct a railroad, commencing at such point on the Cleveland, Columbus and Cincinnati Railroad as the directors may select, either in the county of Cuyahoga or Lorain, and within thirty miles from Cleveland; thence to Elyria, in Lorain county, unless the junction with the Cleveland and Columbus road should be made at Elyria; and from thence on the most feasible route to intersect the Mad River and Lake Erie railroad at Bellevue, or at such other point as the directors shall choose, and thence to Lower Sandusky; and the said corporation shall have power to con-

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struct the said railroad or a branch of the same, from Elyria to Sandusky City, and from thence to Lower Sandusky."

Under this provision the road has been constructed from Cleveland by Ohio City, Elyria, to Sandusky City, and is now being constructed thence nearly on a straight line to Port Clinton, crossing the Sandusky bay, and extending, on the shortest route to the Maumee. This route is alleged to be some eight or nine miles shorter than any other.

By the amendatory act of the 2d of March, 1846, the "Junction Railroad Company," was authorized to extend its line of railroad to some point on the Maumee river, with the privilege of transporting goods and passengers, transported on the road of said companies, across said river, by ferry or otherwise, as the directors thereof shall elect, to the city of Toledo; Provided, the said company shall in no wise obstruct or hinder the navigation of said river.

The sixteenth section of the original charter gave power to the corporation to locate and construct branched roads from the main line to other towns or places in the several counties through which said road may pass. And by the seventeenth section the company was authorized to commence, complete, and put in operation, any part of said road, or any branch thereof, aforesaid, at any point on the route of said railroad which the interest of the company may require to be first commenced and completed.

The point where the Junction railroad was to commence on the Cleveland, Columbus and Cincinnati railroad was left to the discretion of the directors, within the limitation of thirty miles from Cleveland. The road was commenced at Ohio City, near to Cleveland, and to the Columbus road, but not on it. Admitting this to be within a liberal construction of the charter, the road was extended by Elyria, Amherst, Vermilion and Huron to Sandusky City, connecting with the Mad River railroad at that point.

Instead of extending the road from Sandusky City to Fremont, the last point named in the original charter, a survey has been made to cross the bay a few miles above Sandusky City, on nearly a straight line to Port Clinton and the Maumee river. And this, it is contended, can not be done under the original charter or the first amendment. That amendment "authorized the company to extend its line of railroad to some point on the Maumee river." The extension of a line does not seem to authorize a departure from the line at the middle or any other part of it, except from its terminus. Had the extension commenced from this point, no navigable water would have been crossed by the line of the road to the Maumee, except Sandusky river. That this was the direction the legislature intended to give the road, appears by the words used, and also by the provision that in crossing the Maumee its navigation should not be obstructed—there being no such provision for crossing the Sandusky bay.

It is supposed that the branching power from the main road, as provided in the sixteenth section, and the authority given in the seventeenth section to make and complete any part of said road, or any branch thereof, as the company may direct, authorized the diversion of the road to Port Clinton, crossing the Sandusky bay.

The power to make branches is limited to towns or places, in the several counties through which the main road shall pass. Now, although the branches may be made before the main road, yet they must proceed from the line of the main road, and terminate at towns or places in the same county. The branch is an incident to the main road, and whether made before or after the construction of the main road, the termini of the branch is the same.

By the direction given to the road from Sandusky City, it is clear it was not intended to run to Fremont, but to cross the bay in the direction to Port Clinton, leaving the direct route to Fremont several miles south. As an excuse for this

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departure, it is said in the answer that the people in Fremont, by subscriptions or otherwise, gave no encouragement to the company to run the road to that place ; and that the route selected is better, and several miles shorter than the one by Fremont. Under such circumstances it is difficult to say that the road now in progress from Sandusky City to the Maumee, over the bay and by Port Clinton, is a branch of the original road within the charter. Neither its commencement nor termination is within the sixteenth section. It does not branch in the county of Ottawa, nor terminate at some town or place in that county. It is in fact the main road from Sandusky City to the Maumee, and was avowedly intended to be so, from the time the route was surveyed.

The charter requires the company to organize in five years, and to complete twenty miles of the road in ten years from the time its structure was commenced ; and under this provision it is said the company having made more than twenty miles of the road, may, at its own convenience, extend the road to Fremont from Sandusky City, and the road, if extended to the Maumee from Fremont, must pass through Ottawa county ; and then the road now in course of construction may be considered as a branch or branches from it. It can not be within the purpose of the company to make the road to Fremont, and thence to the Maumee. No benefit could result to the company or the public from such an expenditure. There is now a road in progress from Fremont to Toledo, and also the Port Clinton road, running in the same direction.

There is no admitted latitude of construction, it seems to me, which can bring the Port Clinton road within the charter of the Junction railroad as amended. It would sanction a principle which would enable chartered companies to disregard the limits prescribed, and give such a direction to roads as their interests may dictate. By the tenth section, " if the corporation, after having selected a route for said railway,

find any obstacle in continuing said location, either by the difficulty of construction or procuring the right of way at a reasonable cost, or whenever a better and cheaper route can be had, it shall have authority to vary the route and change the location." This does not authorize the company to abandon and disregard the points named in the charter, but to change the route which they have selected, for the causes stated.

Upon the deliberate consideration which I have given to the Junction railroad charter, I am brought to the conclusion that it does not authorize the route selected, and without authority it is presumed no one could contend for the right of crossing the Sandusky bay. The amendment extending the road gives no such authority.

The act of the 1st of May, 1852 (3 Curwen's Revised Statutes, 1877), provides, "that any number of natural persons, not less than five, may become a body corporate, with all the rights, privileges and powers conferred by, and subject to all the restrictions of that act."

The second section declares, "that any number of persons as aforesaid, associating, to form a company for the purpose of constructing a railroad, shall, under their hands and seals, make a certificate which shall specify as follows: 1. The name assumed by such company, and by which it shall be known. 2. The name of the place of the termini of said road, and the county or counties through which such road shall pass. 3. The amount of capital stock necessary to construct such road. Such certificate being acknowledged before a justice of the peace, and certified by the clerk of the Court of Common Pleas, and recorded by the Secretary of State, shall confer corporate powers.

On the 6th of October, 1852, Ebenezer Lane and five others applied, under the above law, to be incorporated as the "Port Clinton Railroad Company," beginning the road at Sandusky City, and extending it by Port Clinton, over the

Sandusky bay, to Toledo ; and all the requisites of the act having been complied with, they became a corporate body. This body, on the 11th of January, 1853, submitted to James B. Steadman, Acting Commissioner, the plan of a bridge for crossing the bay, which he approved, and which approval was notified to the company.

Two objections are made to this act of the Commissioner.

1. That it was contrary to the decision of the Board of Public Works. 2. That the Acting Commissioner had no jurisdiction of the matter.

It appears that on the 8th of July, 1852, the Junction railroad applied to the Board of Public Works, "to obtain leave, if it be necessary, to construct a draw-bridge across Sandusky bay," which was refused by the Board for want of jurisdiction.

The decision of the Board, on the application of the Junction Railroad for leave to cross the bay by a bridge, was a very different application from that decided by Steadman. He approved of the plan of the bridge : the right to cross the bay was not submitted to him. But on the 17th of February, 1850, the Board of Public Works did reverse the decision of Steadman in relation to the Port Clinton bridge. And I will now consider the effect of this reversal.

The twentieth section of the above act (3 Curwen's Revised Statutes, 1852), gives the power to the Acting Commissioner, the same as to the whole Board. Either may approve of the plan or structure of a proposed bridge over a navigable water ; consequently, they act independently of each other, and no provision having been made for an appeal to the Board from the decision of the Acting Commissioner, his favorable decision is final. And this power to the Acting Commissioner being given by law, can not be controlled or reversed by the Board. The procedure of the Board, therefore, in the reversal of the approval by Steadman of the plan of the bridge presented by the Port Clinton Company, was void.

It was an exercise of power which did not belong to the Board.

If the application had been made to the Board by the Port Clinton company, for the approval of the plan of their bridge, and the Board had decided against it, having jurisdiction of the matter, the Acting Commissioner could not in form or in effect reverse the decision. But the application was, as above stated, by the Junction Railroad, "for leave to cross the bay," and this power did not belong to the Board; it, therefore, very properly held that it had no jurisdiction. But it had jurisdiction, and so had the Acting Commissioner, to approve the plan of the bridge. An appeal, under the statute, from the decision of the Board, by the Junction railroad, would have been ineffectual, as the Board was asked to do that which the law did not authorize it to do.

The right to cross a navigable water by a railroad bridge, must be given by the sovereign power, by a special or general act. Where this is not done, neither the Board of Public Works, nor an Acting Commissioner, can approve of the structure of a bridge over it. For the reasons above stated, I have been brought to the conclusion, that the charter of the Junction Railroad, original and amended, does not authorize the company to construct a railroad bridge over Sandusky bay at the place designated.

But the act of approval by the Commissioner, on the application of the Port Clinton company, is objected to, on the ground that the Sandusky bay was not a public work, "under his direction," within the meaning of the statute.

The words of the statute are, "whenever the line of any railroad company now existing, or which may hereafter organize under this act, shall cross any canal, or any navigable water, the said company shall file with the Board of Public Works, or with the Acting Commissioner thereof, having charge of the public works where such crossing is proposed, the plan of the bridge, and other fixtures for crossing

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such canal or navigable water, designating the place of crossing; and if the said Board, or Acting Commissioner thereof, shall approve of such plan, he shall notify such company, in writing, of such approval."

A corporation, formed under this general law, is vested with all the ordinary powers to accomplish the purpose intended. It may appropriate private property, and do all other things necessary in the construction of a railroad. The general act is as specific in its details of the rights and duties of the company as can be found in special acts of incorporation. The legislature of Ohio has been cautious, as all other legislatures have been, in passing special acts for bridges and railroads, to guard against obstructions on navigable waters. And this twentieth section of the general law, was intended to preserve this great public right. The plan of a bridge over any navigable water must be approved by the Board of Public Works, or by an Acting Commissioner. This duty was more appropriate to the general business of the members of that Board, than to any other association under State organization.

To limit the application of this provision to the crossing of canals, and waters made navigable by the State, would strangely disregard the policy of the act, and the necessities of the public. The language of the section does not authorize so narrow a construction. It was known, that in every part of the State, railroads would be projected which necessarily cross navigable waters. Special provision is made for the crossing of canals. Our best rivers are navigable by nature; and on the theory stated, no provision is made in the act for crossing them. They are navigable waters, and are embraced by the terms of the act.

The Acting Commissioner, it is said, must "have charge of the public works, where such crossing is proposed;" and that where there are no public works, his approval can not be given. "Having charge of the public works, where such

crossing is proposed," means nothing more than that such place shall be within the territorial jurisdiction of the commissioner. Any other construction would involve this absurdity: However a navigable river might be improved by the public works, yet if there were not public works at the place of crossing, the commissioner can not act. The legislature can not be charged with acting so unwisely. By the law of 1852, a new system was introduced, suited to the enterprise of the age, and it was intended to cover the whole ground of ordinary legislation on the subject. The words "navigable waters," were used in no restricted sense; they embrace, and were intended to embrace, all waters within the State, which are navigable by the works of art or nature.

The plan of the bridge over the Sandusky bay having been approved by Steadman, the Acting Commissioner, and the place of crossing being within his jurisdiction, it is not doubted, that under the "Port Clinton Charter," a bridge may be constructed as proposed, if it cause no obstruction to commerce.

Whether we look into the ordinance of 1787, the acts of Congress of the 13th July, 1787, of the 7th of August, 1789, of 7th of May, 1796, or the constitution, which declares that Congress shall have power to regulate commerce among the several States, we find the power to protect the commercial interests of the Union. But, as was observed by the court in the Wheeling bridge case, the exercise of this great public right is not incompatible with the enjoyment of local rights. The public right consists in an unobstructed use of every navigable water, connecting two or more States: the local right, in crossing such water. The general commercial right is paramount to all State authority.

The question of obstruction remains to be considered. Numerous affidavits have been read, made by persons acquainted with the navigation of the Sandusky bay, who

think the bridge with the draws proposed, in a high wind and also in a dark night, would obstruct the navigation. When the wind is strong, it is said by some, that sail-vessels require the whole width of the bay to beat against the wind, and that at such times no sail-vessels could pass the draw. The draw proposed is 144 feet, to be opened and closed on a pivot in the center. It is admitted that steam vessels could pass the draw with less difficulty than vessels with sails.

This class of witnesses suppose that all vessels not propelled by steam, in a strong wind could pass the draw only by the aid of ropes, working up by the side of the piers; and that this would cause considerable delay, and some expense. Other witnesses, of equal experience, differ from the above. They think vessels can pass the draw with little or no difficulty, and that in time of wind, not so high as to force them to anchor, they could pass by working round the piers with ropes, which would take up a very short space of time. And that in good weather the boats would sail through the draw without loss of time. Several witnesses speak of draws in bridges over arms of the sea, of less width than proposed, where vessels are constantly passing without complaint or delay. The witnesses from the sea-board, when added to those from the lake, are greater in number than those who think the bridge would obstruct the navigation of the bay.

Against the bridge it is urged that considerations of public advantage can not be weighed against any appreciable obstruction. That a public nuisance can not be tolerated, on the ground that the community may realize some advantages from its existence. Such is admitted to be the general principle on this subject; and yet there can scarcely be a draw in a bridge which does not, to some extent, delay vessels; but this is submitted to from public necessity.

The draws in the bridges over Charles river, which is an arm of the sea, must be subject to the winds and waves, and also to the flowing of the tides ; and yet through these draws more than ten times the number of vessels pass daily that would pass through the draw in the proposed bridge. The unskillfulness of our navigators and seamen on the lakes is referred to, as an argument against the bridge. But men who undertake the navigation of vessels are presumed to have the necessary skill, and all regulations of commerce are founded on this hypothesis. Nor is an argument admissible, that proper attention would not be paid to the draws, by necessary lights, and hands to open them. All such regulations are founded on the supposition that proper attention will be paid, as less than that would expose the bridge to damage.

The commerce of the bay above the bridge, including the Sandusky river, is not large ; but it is of sufficient importance to bring it under the regulation of the commercial power of the Union, and to require its protection.

In the Wheeling bridge case the court held, if a draw should be constructed in the bridge over the western channel, so as to admit of a safe and an unobstructed passage to steam-boats that could not pass under the eastern bridge, it would be considered as removing the nuisance complained of. To pass through a draw on a river, when its banks are full and its current rapid, is attended with much more difficulty and danger than where the draw is over a water agitated only or chiefly by the winds.

Nothing is more common than for witnesses, who are called as experts, to differ in opinion. And where this difference is so nearly on a balance as not to incline the scale on either side, however strong the testimony may be, when viewed on one side only, yet when both sides are considered, the parts neutralize each other, so as to produce no very

Samuel Works v. The Junction Railroad.

decided effect on the mind. This is the character of the evidence in the case under consideration. In such a case the preventive and extraordinary remedy invoked ought not to be given. It is a remedy which may be ruinous to one of the parties, when the basis of the action is doubtful.

The prayer for an injunction is refused.

CIRCUIT COURT OF THE UNITED STATES.

INDIANA—MAY TERM, 1853.

THE UNITED STATES *v.* ELIAS S. BEARD ET AL.

Where certain work was to be done by the defendant, and certain things were to be done by the plaintiffs, to enable the defendant to perform his contract, the declaration must show that the precedent acts were done, by the government, to enable it to sustain an action for damages on the contract.

A demurrer reaches the first defect in pleading.

Mr. *O'Neal* District Attorney of the U. States.

OPINION OF THE COURT.

This action is brought on a penal bond in the sum of \$10,500, against Beard as principal, and Jesse Beard and John Perdue as securities, that the defendant, E. S. Beard, should perform a contract made with the United States, on the 9th of April, 1846, "for furnishing materials, and building 6900 perches of a vertical wall at Memphis, in Tennessee." The action being brought upon the penalty of the bond, the defendants craved oyer of the bond and contract, and averred general performance.

The plaintiffs replied, denying that the defendants furnished the materials, built the wall as by the contract he agreed to do, and averred that the said Beard on the 26th of November, 1846, abandoned the contract, and deserted the Navy Yard, at Memphis, where the work was to be done ; whereby the plaintiffs were obliged to employ other persons to do the work, at an increased expense over the contract, &c.

To this replication the defendants demurred, and the plaintiffs joined in demurrer.

On these pleadings the question arises, whether the plaintiffs have done all that was incumbent for them to do, under the contract, to maintain this action.

By the contract, Beard agreed to furnish, for the consideration named, " all the materials, and build 6,900 perches of a vertical wall, at the Navy Yard, at Memphis, Tennessee, or so much as shall be required of him by the engineer, or other duly authorized agent of the government, of the following description, viz : " The height of the wall to be from five to thirty feet, varying according to the height of the flats, and to suit the grade of the yard. The thickness will vary from three and a half to ten feet, according to the height of the wall. It is to be commenced on the low ground, after it has been properly leveled. So much of the wall as will be below the ground, after it has been graded, is to be rubble masonry, laid without mortar, and built vertical on both sides ; the stones for which are to be of the best quality of sand or lime stone, of large size, &c. After the yard has been graded, the wall is to be laid in courses, and with mortar, the courses to be from ten to twenty inches thick," &c.

The work was to be completed in twelve months. The materials and work to be paid for, after inspection, retaining ten per cent.

The contract is specific as to the materials to be furnished, and the quality of the work to be done, but is indefinite as to the amount to be done. This was left to certain mea-

surements, and to the judgment of the engineer. The height of the wall was to be regulated by the elevation of the flats, and to suit the grade of the yard. It was to be commenced on the low ground, after the ground was properly leveled.

This leveling of the ground, and varying the height of the wall, are not so specified in the contract as to enable the contractor to go on with the work, except under the special instruction of the engineer. It does not appear who was to do the grading. As there is no provision for this work in the contract, it was to be done, as may be presumed, by some other person than the defendant, and by what rule does not appear. If the grading was to be done by the contractor, it was indispensable that the grade should be fixed by the agent of the plaintiffs; and it appears by the contract of the defendant, that until the grading was done, the wall to be built by the defendant, could not be commenced.

The government reserved the right to increase or diminish the work, paying accordingly. Under this discretion, the quantity of stone required should be stated, as if the wall should be lowered, less stone would be required.

It would seem, therefore, to be clear, that to enable the government to recover damages on this contract, for the non-performance of the work, by the defendant, it must appear that all the steps were taken by the government, to enable the defendant to commence and prosecute the work, which he had agreed to do. He could not commence the work until the ground was leveled, and instructions were given as to the height of the wall. As these were precedent acts to any action by the defendant, it was necessary to show in the declaration that they were done by the government. By the oyer pleaded, the conditions of the contract are brought into the case, and in effect must be considered as if the action had been brought upon the contract.

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The demurrer to the replication reaches this defect in the pleading. The demurrer is sustained. Leave will be given to amend the pleadings, on motion of the plaintiffs.

[Before Judge McLean, at Washington City, in 1853.]

THE NORTHERN INDIANA RAILROAD CO. AND THE COM'RS, &C.,
OF THE WESTERN DIVISION, &C. v. THE MICHIGAN CENTRAL
RAILROAD.

A corporation is not amenable to process, except in the State where its business is done.

A corporation in Indiana cannot sue, in that State, a corporation doing business in the State of Michigan.

Persons or corporations interested, must be made parties, especially where the object of the bill cannot be attained, without seriously affecting the interests of such persons or corporations

When a subject is essentially local, as trespass on real estate, &c., the action must be brought in the State where the injury was done.

Messrs. *Bronson & Denis* for the plaintiffs.

Mr. *Jay* for the defendants.

OPINION OF THE COURT.

This is an application for an injunction, due notice having been given to the defendants.

The complainants in their bill represent that, under a charter granted by the State of Indiana, they surveyed and located a railroad through Northern Indiana, and that the route of that part of the Western division of said railroad, lying between Michigan City, in the county of Laporte, and the Western line of the State of Indiana, was duly surveyed and located, and the right of way therefor duly acquired; and that they are entitled to have the sole and exclusive occupancy of the lands acquired for that purpose. That a part

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of the lands so acquired consist of a strip of ground eighty feet in width, extending from Michigan City to the west line of the State, and that their railroad has been completed upon the whole of said route from Elkhart to Laporte, and from Michigan City to the west line of Indiana, on which their cars are now running for the transportation of passengers, &c.

And the complainants aver that the Michigan Central Railroad Company, are a corporation created by, and doing business in the State of Michigan; that they were incorporated by an act of the legislature of the State of Michigan for the purpose of constructing a railroad from Detroit, in the State of Michigan, to some point in the same State upon Lake Michigan, accessible to steamboat navigation on the lake, and with authority to extend their railroad to the southern boundary of the State of Michigan; that said road has been constructed to New Buffalo, and thence to the northern line of the State, in the direction toward Michigan City, in the State of Indiana; and that they have extended their road to Michigan city.

And the complainants allege that the New Albany and Salem Railroad Company is a corporation created by and under certain acts of the legislature of the State of Indiana, and doing business therein, and that it has no power or franchise to construct, or authorize the construction of any railroad whatsoever, except what is specified in certain statutes, &c.

That on or about the 24th of April, 1851, the Michigan Central Railroad Company, and the New Albany and Salem Railroad Company, entered into a contract by which the Michigan company claim the right to construct a railroad, by a route nearly parallel with the complainants' railroad from Michigan City to the western line of the State of Indiana. And that, in fact, the Michigan company have constructed their road, or are about constructing it, in the im-

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mediate vicinity of the complainants' road, and several times crossing the same, all which is an infraction of the complainants' franchise ; that they pass over the lands owned by complainants, which were purchased for the accommodation of their road ; and they aver that the New Albany and Salem Company are not authorized by any act of the legislature, to build a road between Michigan City and the western line of the State, and they pray that the Michigan Central Company may be enjoined from making their road, and from running cars on the same, &c.

No answer has been filed to the bill, but the question comes up as on a demurrer.

The bill is filed by a corporation in Indiana, against a corporation of Michigan, and the question necessarily arises whether the Circuit Court of the United States, sitting in Indiana, has jurisdiction in such a case. It is clear that a corporation cannot be sued out of the State in which it is established, and in which its corporate functions are exercised. The individuals of the corporation are liable to an action of trespass, if done out of the State where process is served, but as corporators they are responsible only in the State where the business of the corporation is done.

The Michigan Central Railroad, in building the road from Michigan City to the western line of Indiana, claims to act under the contract made with the New Albany and Salem company, which claims a right under its charter to make the road, and transferred the right to the Michigan company. The bill asks an injunction against the Michigan company in its corporate capacity, as in that capacity the contract was made, and the work complained of has been done. I know of no process which can reach a corporation of Michigan from the Circuit Court, sitting in Indiana. It is amenable to no process out of the State. The Circuit Court of the United States, sitting in a State, has no jurisdiction beyond the limits of the State, except in criminal cases subpoenas may

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be issued for witnesses throughout the United States. In every other particular, the Federal court, acting in a State, is as limited in its jurisdiction as any State court, whose jurisdiction extends throughout the State. It seems to be very clear that the Circuit Court, sitting in Indiana, has no jurisdiction in this case, as presented by the bill.

If the bill be filed in Michigan, against the Central Michigan Railroad Company, the Circuit Court, in a proper case, would have jurisdiction over the company. But such a procedure would give rise to another question, whether a Court of Chancery, in a case respecting the title to land, and particularly to restrain a right set up under the authority of the State of Indiana, could exercise jurisdiction while sitting in the State of Michigan. In the discussion, questions of a local character would necessarily arise, which could not, it would seem, be acted upon in Michigan.

But independently of this objection, there is another which, it appears to me, is fatal to the jurisdiction. The New Albany and Salem Railroad Company, is not made a party to this proceeding, and that company is materially interested in the case.

The bill sets up that the charter of that company, does not extend north beyond Salem, and especially that it does not authorize the construction of a railroad from Michigan City to the western line of the State. It appears that the road from Michigan City west, has not only been constructed to the western line of the State, but it has been extended to Chicago, and is now in operation; and it also appears that a very large proportion of the railroad from Salem to Michigan City, has been built, and will soon be completed and in operation. It also appears the Michigan company, in building the road from Michigan City to the western line of Indiana, agreed to subscribe a half million of dollars to the road from Salem to Michigan City, which has not only been subscribed, but some part of it has been paid.

T. G. Gaylord, Survivor v. Howard P. Johnson.

From the above facts, it appears that the New Albany and Salem Company is interested to the whole amount of its charter as claimed, from Salem to Michigan City, and thence to the western line of the State, and that more than a million of dollars have been expended on these lines of road. And yet the bill calls upon the court to act on this subject, and to decide, that the New Albany and Salem charter gives no authority to make a railroad from Michigan City to the western line of the State, and consequently the Michigan company has no right to build the road under its contract.

An injunction, as prayed for, which would not involve the rights of the New Albany and Salem Company, to the extent of their charter as above stated, and money expended under it, but it would defeat the further payment of the subscription of half a million of dollars, to the road between Salem and Michigan City, by the Michigan Central Railroad Company. Upon the whole, I cannot grant the injunction.

If the complainants desire to bring the subject before the Supreme Court, by filing the bill in the Michigan Circuit Court of the United States, an answer or demurrer may be filed, and a decree, pro forma, entered, which will bring the case, without much delay, before the Supreme Court.

T. G. GAYLORD, SURVIVOR v. HOWARD P. JOHNSON.

The assignee of a note, a citizen of Ohio, may bring his action in the Circuit Court against the assignor, a citizen of Indiana.

A note made payable in Ohio, is an Ohio contract, and demand of payment when the note is due, protest and notice are due diligence.

Where the action is between the assignor and his immediate assignee, it is only necessary to sustain the jurisdiction of the Circuit Court that plaintiff and defendant are citizens of different States.

The action is on the contract of assignment.

T. G. Gaylord, Survivor v. Howard P. Johnson.

Mr. *Henderson* for plaintiff.

Mr. *Ray* for defendant.

OPINION OF THE COURT.

This action is brought by the plaintiff as assignee of a promissory note by the defendant the payee, who was a citizen of Indiana. Two objections are made by the defendant.

1. That the assignor could not sue in this court, consequently his assignee cannot sue.

2. By the laws of Indiana, the maker of the note must be prosecuted to insolvency,—the note, not being payable to or at a bank, is not negotiable by the laws of Indiana.

This suit is brought against the indorser, to which no objection can be made, under the 11th sec. of the Judiciary Act, which applies to assignments, where the action is brought by the assignee against the maker of the note.

There was a special plea that the note was assigned in Indiana, to which there was a demurrer.

The note was payable in Ohio, it was therefore an Ohio contract, and governed by the laws of Ohio. Demand of payment of the note when due, protest and notice, are due diligence. As this action is brought against the assignor, by his assignee, the place of assignment is immaterial. The action is founded on the assignment, and the plaintiff and defendant are citizens of different States. This gives jurisdiction.

The demurrer is sustained, and judgment.

Columbus, Piqua, and Indiana R. Co. v. Indianapolis and Bellefontaine R. Co.

THE PRESIDENT AND DIRECTORS OF THE COLUMBUS, PIQUA AND INDIANA RAILROAD COMPANY v. THE PRESIDENT AND DIRECTORS OF THE INDIANAPOLIS AND BELLEFONTAINE RAILROAD COMPANY.

When two railroad companies agree to build a road from certain cities, to connect with each other at a given place, and that the charges for transportation shall be regulated by both companies, and also the meeting of the cars, and the through freight cars, if one of the companies shall change its gauge so as to break up the connection contemplated, an injunction will be granted, to prevent the change of gauge.

A contract entered into to make the gauge, by one of the parties, contrary to the law of the State, such contract is not illegal, if it appear it was made in reference to an alteration of the act, and such alteration was procured, before any part of the track was laid.

To fix the charge for the transportation of passengers and freight, is the exercise of the franchise by each company, and if they agree that both companies shall regulate this, it is no abandonment or transfer of the franchise of either.

Messrs. Stanbery, Blackford, and James for complainants.

Messrs. Andrews and Yandes for the defendants.

OPINION OF THE COURT.

On the 30th of January, 1852, the parties in this case entered into the following agreement:

It is mutually agreed by and between the Indianapolis and Bellefontaine Railroad Company of Indiana, of the one part, and the Columbus, Piqua, and Indiana Railroad Company, of Ohio, of the other part, as follows: The lines of said roads from the city of Columbus, Ohio, to the city of Indianapolis, Indiana, shall meet at Union on the line between the said States, in direct connection in the same depot building, and shall be for transportation of freight and passengers a through line between the cities, each company receiving upon the through freight and passengers, in proportion to the length of the road in each, which freight and fare

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of passengers shall be fixed by the two roads, and to carry out which each shall be authorized to give through tickets, and freight bills on the route, to be accounted for on settlement. The time of running and meeting of the cars, and through freight cars, shall be arranged by the two companies, so as to carry into effect, in good faith, the through business connection on the roads between the two States. This contract was ratified by both boards.

Sometime after the above contract was entered into, a further agreement, in regard to the gauge of the road, was considered necessary; and the President of the Indiana Board made a contract with the Ohio company, that the gauge on the entire road should be four feet eight and a half inches. The Ohio gauge was fixed by statute at four feet ten inches; and other gauges were prohibited. This contract was never ratified by the Indiana company; and a great number of depositions were taken to show, from the usage of the company, that the contract, made by the President, was binding on it, though not ratified by it.

Under the above contract it became necessary for the Ohio company to procure an act of the Ohio legislature, to legalize the gauge it had agreed to establish; and a law to that effect was obtained some four months after the contract was entered into.

It was admitted by the parties, that when the first contract was made to connect the two roads at Union, about forty-five miles of the Indiana road was completed from Indianapolis in the direction to Union.

These are the leading facts in the case, and the complainants, in their bill, represent, that the defendants are about to change the gauge of their road, so as to defeat the connection agreed upon by the two companies, requiring at Union a change not only of the passenger cars, but also the cars carrying freight; and it is alleged that the same gauge has been adopted as the Cleveland road, to the material and

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irremediable mischief of the Columbus company, except by an injunction to restrain the Indiana company from carrying out its contract with the Cleveland Railroad Company.

I do not deem it necessary to look into the depositions taken to show that the second contract, as to the gauge agreed upon, was binding on the Indiana company. I think the first contract between the two companies, embraces all the rights of the complainants, which are claimed under the second contract.

The contract provided for a road from Indianapolis to Union, and thence to Columbus, in Ohio. It is admitted by the parties that at this time, about forty-five miles of the Indiana road, in the direction to Union, was completed; and that the gauge of that part of the road was four feet eight and a half inches. It also appears that the Ohio company applied to the legislature, and procured an act which legalized the gauge they contracted for, and which conformed to the gauge of the Indiana road.

No one can read the contract and not see, that the freight cars were to be run through the entire route. The words are, "The time of running and meeting of the cars, and through freight cars shall be arranged by the two companies, so as to carry into effect, in good faith, the through business connection on the roads between the two States." The running and meeting of the cars would not refer to the through freight cars. If the freight cars are to be run through, they don't meet, in the sense spoken of. The change of freight cars would cause great delay and expense, especially if the freight consisted of live stock. But the passengers can change cars in five minutes. It was therefore proper to provide for the meeting of the passenger cars, and also to regulate "the through freight cars."

If the freight cars were to be run through the whole line, it is clear that the gauge must be the same throughout the line. But there is another fact equally conclusive; the Ohio

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end of the line was made of the same gauge of the Indiana although different from the Ohio gauge provided for by statute, and to authorize which, an act of the Ohio legislature was procured by the Ohio company. And it appears the greater part of the Ohio road has been completed.

But there is another consideration which, if possible, is still more conclusive.

At the time the first contract was made, it is admitted that more than forty miles of the Indiana road was completed, which was the line of road embraced by the contract. It could apply, from the description in the contract, to no other route. Can a railroad be made without a gauge? In the nature of things this is impossible. It follows then, necessarily, that the gauge of the entire road was the gauge of the Indiana road that was completed, and which was embraced by the contract. Can anything be more conclusive than this? But in addition to these facts, the Indiana company extended its road to Union, or near to it, and the Ohio company built the Ohio road to Piqua, or near to it, from Columbus, and both roads were made of the gauge of the Indiana road, which had been made before the contract was signed. The work on both sides of Union, under the contract, shows the construction of it by both companies.

An objection is made to the legality of the contract to build the Ohio part of the road, as the gauge is in violation of the Ohio statute.

To this it is answered in argument, that the defendants cannot take advantage of the objection, as it is a matter which rests between the State and the complainants, and that the State only can raise this objection. I am not prepared to say that any party, who is called upon specifically to execute a contract may not set up the illegality of that contract, as being against an express statute. But the answer to the objection that although the contract was made, it was with reference to a future execution of its conditions,

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when the modification of the law of Ohio should be obtained, which removed the objection. And it in fact appears that the construction of the road, by laying down the rails, was not commenced until long after the passage of the amended act by the legislature of Ohio. The law, therefore, was not violated under the contract, nor was it intended to be violated.

It is further alleged that, under the contract the respective companies, by acting together in fixing the rates for the transportation of passengers and freight, conveyed a part of their franchise, which they had no power to do.

There is no part of the contract which, in this respect, affects the franchise of either company. The companies may agree, as individuals may agree, to certain rates of transportation which may be considered mutually advantageous. Neither company has parted with its corporate powers; each acts for itself, and under its own powers in fixing the rates of transportation, and they both agree that the charge shall be uniform throughout the line.

An injunction will be issued to prevent the Indiana company from changing its gauge, from Indiana to Union, which it has expressed a determination to do, and had actually commenced the work.

CIRCUIT COURT OF THE UNITED STATES.

OHIO—APRIL TERM, 1853.

NEW YORK & ERIE RAILROAD *v.* SHEPARD & SHEPARD.

The Circuit Court takes jurisdiction where a suit is brought by a corporation, from the place where it is located, and where its corporate functions are discharged.

No further allegation of citizenship is required.

Mr. *Willey* for plaintiffs.

Mr. *Stanbery* for defendants.

OPINION OF THE COURT.

The declaration states, The New York and Erie Railroad, doing business and resident in the State of New York, plaintiffs, complain, &c. The defendants demurred on the ground that there was no sufficient allegation of citizenship, to give jurisdiction to the court.

Where a corporation of another State sues in this court, an allegation of citizenship is not now necessary, as was formerly required. The State where the corporation is located and in which its corporate functions are exercised, if alleged, is sufficient to give jurisdiction.

The demurrer is overruled.

TRACY v. TRACY ET AL.

If a judgment become dormant its lien is lost, as against a mortgage executed by the judgment creditor, during the continuance of the judgment lien.

A revival of the judgment cannot affect prior liens.

But such revival gives a lien on the land of the defendant, not included in the mortgage, and which has on it no prior liens.

Messrs. *Swan & Andrews* for complainant.

Mr. *Curtis* for defendant.

OPINION OF THE COURT.

This case is brought before the court to have determined the priority of certain liens.

There are seven distinct parcels of land. The liens of Morrison, Young, and Vose, stated as liens 1, 2, and 3, extend to the seven parcels of land. A judgment in favor of Hurd was rendered in the year 1841. The mortgage of H. D. Tracy was executed in 1843, on four of the seven tracts of land. The judgment of Hurd became dormant, and was revived in 1847.

The proceeds of the sales of all the lands amounted to the sum of \$10,940. The proceeds of the four tracts included in Tracy's mortgage amounted to the sum of \$8,375. The proceeds of the remaining three parcels, not included in the mortgage, but embraced in the levy under Hurd's judgment are \$2,545. The amount of the first three liens, which are prior to both the judgment of Hurd and mortgage of Tracy, with the costs of this suit, and the charges of the administrator, amount to about the sum of \$8,950, leaving a balance applicable to liens No. 4 and 5, of the reported liens of \$1,970.

If after judgment and levy on lands, the judgment debtor executes a mortgage, and the judgment becomes dormant, the revival of the judgment does not operate to the prejudice

Lessee of Bulkley et al. v. Joseph Buffington.

of the mortgage lien ; but in such case the mortgage lien becomes perfect, and the judgment lien on the mortgaged premises is lost. *Norton v. Beaver*, 5 Ohio Rep. 178 ; *Miner v. Wallace*, 10 Ohio Rep. 403 ; *Lessee of Paine v. Moreland*, 15 Ohio Rep. 435.

In this case Hurd's judgment having become dormant, and Tracy's mortgage having intervened, the mortgage lien become paramount to that of the judgment.

The three prior liens must be satisfied out of the proceeds of all the tracts of land. The revived judgment gives a paramount lien to that of the mortgage on the land, not included in the mortgage.

LESSEE OF BULKLEY ET AL. v. JOSEPH BUFFINGTON.

When a deed was executed for land in 1799, to the son-in-law of the grantor, who was insolvent, and who shortly after took the benefit of the bankrupt law of 1800, and placed the same land on his schedule, which was sworn to, and no claim being made under the deed, nor taxes paid for fifty years, the court instructed the jury these were strong circumstances of fraud.

The delivery of a deed by the grantor to the recorder, may, under favorable circumstances, be considered a delivery, but it is not conclusive.

Mr. *Smyth* for plaintiffs.

Mr. *Vinton* for the defendant.

OPINION OF THE COURT.

This is an action of ejectment to recover certain lots in the Ohio Company's purchase.

The plaintiff gave in evidence a deed from Loomis, a bankrupt, to Roger Bulkley, the ancestor of the lessors of the plaintiff, under whom they claim as heirs.

The bankruptcy proceeding was under the law of 1800. The commissioners, under the act, found that the act of bank-

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ruptcy was committed, since the 1st of June, 1800. There was no evidence of the delivery of the deed, except the fact of its having been recorded in 1799. A copy of this record is the evidence given of the deed.

Loomis, the bankrupt, after the deed purports to have been executed, applied for the benefit of the bankrupt law, and on his schedule this identical land was stated as a part of his property. The bankrupt swore to the truth of his schedule, and obtained a discharge from his debts, under the act.

The court instructed the jury that the deed from Loomis to Bulkley, was subject to strong suspicions. Loomis was proved to have been the relative of Bulkley. The deed was executed a short time before Loomis took the benefit of the bankrupt act. He is proved to have been largely insolvent. No taxes have been paid by the lessors of the plaintiff. No claim was set up for the land under the deed for fifty years.

If the deed made by Loomis was bona fide, and for a valuable consideration, which put the land beyond the reach of his creditors, Loomis committed perjury in swearing to the truth of his schedule, on which this land was stated as a part of his property, and to which his creditors were entitled.

But if the deed were made in fraud of creditors, the bankrupt was bound to place the land upon his schedule, for the use of his creditors; and in this view he acted correctly in stating it as a part of his property and in swearing to it. The recording of a deed by the grantor, under circumstances which create no suspicion of fraud, may be considered evidence of delivery. But there are strong circumstances of fraud in this case.

Loomis, at the time he executed the deed, was insolvent, and it was executed a short time before he took the benefit of the bankrupt law. The deed was made to his relative, and as far as appears in the case, neither the grantee nor his heirs set up any claim of title to the land for fifty years; nor

Doe ex. dem. John W. Robertson v. Richard Roe, with notice, etc.

is it shown that they paid the taxes. And, in addition to these circumstances, Loomis claimed the land as his property, placing it upon his schedule, and verified the truth of his schedule by oath. It is for you, gentlemen of the jury, to say, whether the first deed was not executed by the bankrupt, with the view to defraud his creditors. He may afterward have relented, and endeavored to avoid the fraud, by placing the land on his schedule, for the benefit of his creditors and the peace of his conscience. If the facts lead you to this conclusion, gentlemen of the jury, you will find the defendant not guilty.

Verdict—Not Guilty.

DOE EX. DEM. JOHN W. ROBERTSON v. RICHARD ROE, WITH
NOTICE TO THE TOWN COUNCIL OF WELLSVILLE.

Where the charter of the town of Wellsville requires a certified copy of a summons to be served on the recorder, in all suits brought against the town, the court held it did not apply to an action of ejectment.

That in such a case a copy of the declaration and notice, was a sufficient service.

Mr. *Stanbery* for plaintiff.

Mr. *Swan* for defendant.

OPINION OF THE COURT.

This is a motion to dismiss the suit, as the process was not properly served.

The charter of the defendants requires that the first process, in all suits against the town shall be a summons, an attested copy of which shall be served on the recorder, at least ten days before the return. No such copy appears to have been served in the present case. A copy of the declaration was

Doe ex. dem. John W. Robertson v. Richard Roe, with notice, etc.

served, as is usual in actions of ejectment, and a notice to the person in possession.

We are bound by the charter to give the notice as required, but the case before us is not strictly provided for by the charter. The service has been made, according to the ordinary forms of the action of ejectment. If we bring the case before us, within the charter, by construction, a technical application of the charter can not be expected. To look at the substance and give a liberal construction to bring the case within the charter, and then apply the rule technically would be improper.

We think the service is sufficient. The service of process in this action is governed by established rules, and these are different from a mere summons. The copy of the declaration with the notice appended was sufficient service.

The motion to dismiss is overruled.

CIRCUIT COURT OF THE UNITED STATES.

INDIANA—MAY TERM, 1853.

FRENCH, STRONG & FINE v. LAFAYETTE INSURANCE COMPANY.

By a law of Ohio, all foreign insurance companies which, through an agency, do business in the State, are held amenable to the process of the State.

All such companies are liable to be sued, and a service on their agents shall bind the companies which they represent.

It would be unjust and impolitic, to require the injured insured to sue the companies in the State or country where they are located.

There is one agency, if not more, in Cincinnati, from a London (England) office.

Parties can not, by a contract, agree upon a limitation different from the statute, within which suit shall be brought, or the right to sue be barred.

This would be in conflict with the law and its policy. Jurisdiction of corporations attach, in the courts of the United States, from the place where their business is done.

Where a suit is founded on the record of a judgment, in which the court has jurisdiction, no error in the proceeding can be considered.

Nor in such a case can nil debit be pleaded.

Messrs. *Smith, Fox & French* for plaintiffs.

Messrs. *Gregory & Orth* for defendant.

OPINION OF THE COURT.

This is an action of debt, on a judgment rendered in the Commercial Court of the city of Cincinnati; there are also counts in the declaration, on a policy of Insurance.

The policy of insurance was entered into in the city of Cincinnati, on certain property of the plaintiffs by the defendant, to the amount of \$2,500, which was lost by fire. A judgment was obtained, before the Commercial Court, in Cincinnati, for the amount of the policy.

The defendants pleaded nil debit to the 2d, 3d, and 6th counts. And further to the 1st, 2d, and 3d counts, that they are founded on the same contract or policy of insurance. And that it was and is, a parcel of said contract, that no suit or action of any kind, should be brought against said defendant for the recovery of any claim on the policy, in a court of law or chancery, unless brought in six months after the loss.

To the 4th and 5th counts, the defendant pleads nul tiel record. And further, to the 4th and 5th counts, defendant says, it is a corporation under the laws of Indiana, the principal place of business being at Lafayette, in said State. That the officers and directors are citizens of Indiana, and were, &c. That defendant was not served with process. That its agent living in Cincinnati for the purpose of making contracts of insurance, was not otherwise served, than by leaving a copy of the summons at his residence, by which the suit in Ohio was commenced.

To the plea of nul tiel record the plaintiffs joined issue. And they demur to the pleas to the 1st, 2d, and 3d counts. And as cause of demurrer they say, that the matters pleaded in bar are in conflict with the law of the State, which is the law of the forum. Defendant joins in demurrer.

Among other conditions there is annexed to the policy the following : " It is further hereby provided, that no suit or action of any kind against the company, for the recovery of any claim upon, under or by virtue of the policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of six months next after any loss or damage shall occur ; and if any such suit or action shall be commenced against the company after the expiration of six months, next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim, thereby so attempted to be enforced."

The plea in bar is founded on the above limitation of six months.

This is not a condition on which liability is to attach. It does not affect the contract, but the remedy. A condition subsequent, for the payment of money, after the liability is fixed, by which the payment is barred, is a singular condition. It is nothing less than an act of limitation, of six months. A statute of limitation is founded upon public policy. A contract is void if made against the policy of the law. But this limitation in the policy is not only opposed to the policy of the law, but in fixing a different time from the statute, is in conflict with it.

Can parties, in all contracts, make a statute of limitations for themselves, which shall bind the courts? There is no more reason why this should be done, in a policy of insurance, than in any other contract. Such a contract might well require notice of a loss, within a limited time, in order that the underwriters may inquire into it ; but such is not the nature of the above limitation. The diligence required is, after the loss or damage shall have occurred, not to fix the liability, but to recover the money.

By another clause the insurers are not liable to pay, until sixty days after proof of the loss—but the limitation of six

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months runs from the time of the loss. It may not be within the power of the party to prove the loss within six months, but if suit be not brought within that time, the agreement bars a recovery.

This is an attempt to discharge or bar a right of action, before the right occurs. It is a well settled principle, that a release can only operate upon an existing claim—a present right. *Coke Litt.*, 265; 4 *Mass. Rep.*, 688; 7 *Mass. Rep.*, 155; 15 *ib.* 110; 4 *Pick.* 368.

Why has a condition or an agreement in a policy, providing that all disputes arising under it, shall be referred to arbitration, been held to be void? Because it is an attempt to oust the jurisdiction of the courts. 2 *Arnold Ins.*, 1245; 1 *Phillips Ins.*, 23; *do.* 587; 5 *State Rep.*, 134; 1 *Wilson Rep.* 129; 4 *Watt's Rep.*, 41; 6 *Har. & John. Rep.*, 413. In 15 *Mass. Rep.*, 110, the court say: "No cause can be found to show, that a party may be restrained by way of estoppel from maintaining an action, although it be in violation of an executory contract."

An agreement for a valuable consideration or under seal, not to sue for a limited time upon a cause of action accrued or to accrue, can not be pleaded in bar to a suit, if brought before the period expires. 5 *Blackf.*, 120; 6 *Ib.* 283; 19 *John. Rep.*, 133; 11 *Pick.*, 159. Is there any difference as to the legal effect, between such an agreement, and one that suit shall not be brought, after the time limited?

What is the nature of the contract of insurance? The underwriter takes the risk on his own terms, and agrees to pay the damage should a loss occur. Annexed to the policy, though not constituting an essential part of it, is an agreement, in the event of a loss the assured shall bring suit in six months or be barred. What is the consideration of this agreement? It is without consideration, unless it be considered as a part of the contract, under which the liability arises.

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Where a policy provided that the insured should not abandon, until six months after notice of capture to the underwriters, it was held the right to abandon accrued on the condemnation. 10 John. Rep. 273. If a mortgagor stipulate that his mortgage shall be irredeemable, he may still be let in to redeem. 1 Vernon Rep., 192. And if he agreed not to redeem after six months, would he be estopped?

The time specified in the statute of limitation is as much a part of the policy of the law as the act itself. It is a matter of law, and cannot be changed by the contract of parties. If they may shorten the time expressed in the act, they may extend it; or they may, by their agreement, annul it. This, it appears to me, they can not do. It would be a dangerous power. The law was not made for particular cases, but it is founded in a general policy, and applies equally to all contracts, as specified in the act.

Several other questions are made in the case. It is insisted that the corporation is not amenable to process in Ohio.

This, as a general principle, can not be controverted, but the question is, Is not the Insurance Company, though established in Indiana, under a law of that State, amenable to the process issued in this case, under the circumstances?

By the Ohio act of 1847, it is provided that "where the principal office of such insurer is located out of this State, in all suits instituted by virtue of this act, the service of process upon the agent of such insurer for the time being, in the county in which such contract shall be made, shall be as effectual, as though the same were made upon the principal. By the general statute, leaving a copy at the residence of the party, is service.

Under the act of 1851, it is provided that the summons may be served, on the president or other chief officer, or any clerk, secretary, treasurer, director, or agent, of such foreign corporation or body politic, by the sheriff, and when so served,

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the said corporation shall be considered in court for judgment or decree against it.

Under the above acts, the suit was brought in the Commercial Court of Cincinnati, against "the President and Directors of the Lafayette Insurance Company," the corporate name being "The Lafayette Insurance Company." And this misnomer is now made an objection.

It is too late to take advantage of this variance—it should have been pleaded in the Commercial Court. The description of the judgment, in the declaration, is substantially good.

The Insurance Company, by establishing an agency at Cincinnati, came into the State, not by virtue of its original act of incorporation, but under the law of Ohio. It could come in under no other conditions. The agency was established with a view to profit, and having realized the contemplated advantages, it can not claim exemption from the liabilities imposed.

The agent opened an office in the city—made insurance upon property binding the corporation. In fact he discharged, so far as regards insurances, the corporate functions of the company; and this the act of Ohio permitted, on the conditions that the company should be amenable, through its agent, to the courts of Ohio, on any contract of insurance. For this purpose the Ohio act substantially sanctioned the exercise of the corporate powers within the State. The condition imposed was just, and it was accepted by the corporation, and the suit in the Commercial Court was brought on a policy issued by the agent.

There are several corporations of other States doing business, under similar circumstances, in Cincinnati. And there is one agency from a corporation of London, making insurances in the city. Would it be politic in the State of Ohio to permit these agencies to do business within it, and leave

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its citizens to seek redress by suit against the company in any other state or country, wherever it may be located? This would be unjust as well as impolitic. We have no doubt that the State of Ohio had a right to prescribe the conditions on which the defendant might do business in the State, and in coming into the State for that purpose, the conditions attach.

We think the judgment of the Commercial Court is conclusive as to the rights of the plaintiffs, as well to the service of process as to the amount of damages. The judgment comes before us as evidence, and the court having jurisdiction, no errors in the proceeding can be objected to collaterally.

In regard to the question of jurisdiction made in the pleading, that some of the stockholders are citizens of Ohio, it is only necessary to remark that the law is now settled that the State which granted the charter, and within which the corporation does its business, determines its right to sue in this court, and not the citizenship of the stockholders, as was formerly held. And we think the late decisions on this subject have established the true principles on which jurisdiction, in cases of a corporation, should be sustained. The former rule to take jurisdiction from the citizenship of the stockholders, defeated, in many cases, the object of the law, in authorizing suits to be brought between citizens of different States in the courts of the United States.

The corporators having united to accomplish certain purposes, appoint their agents to manage the concern and bind the stockholders, without regard to their citizenship. Formerly the stockholders were required to be citizens of the same State, or at least that no one of them should be a citizen of the same State as the other party, as that would defeat the jurisdiction of the court. On this ground, suits by or against corporations were frequently defeated for want of jurisdiction, while the fact of citizenship had no influence upon the merits of the case or the powers of the corporation.

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It was an objection—a technicality, without substance, and very often defeated an important right.

This action being mainly founded on the judgment of the Commercial Court, which we think was conclusive, the other points made in the case have been considered, as they were earnestly discussed.

Judgment on the record.

FLETCHER v. TURNER.

Where the assignee was on a promissory note, the declaration, must show that the assignor, by his citizenship, had a right to sue in this court.

If this be not done, the declaration is demurrable.

Mr. *Scoby* for plaintiff.

Messrs. *Walpole & Walpole* for defendant.

OPINION OF THE COURT.

This action is brought by the assignee of the notes against the maker, payable to George Fletcher, sen., who assigned them to the plaintiff. In the declaration there is no allegation of the citizenship of the assignor of the plaintiff, and if he were a citizen of Indiana, at the time of the assignment, under the 11th sec. of the Judiciary Act, of 1789, this court has no jurisdiction of the case. In such a case the assignee cannot sue in this court, unless the assignor could have brought suit in it on the note assigned, and this he could not have done, if the assignor was a citizen of Indiana. In the declaration, to give jurisdiction to the court, the citizenship of the assignor should have been alleged.

The demurrer which has been filed to the declaration must, therefore, be sustained.

CIRCUIT COURT OF THE UNITED STATES.

OHIO—AT CHAMBERS, 1853.

HENRY MILLER v. GEORGE McQUERRY.

Slavery is a municipal regulation ; is local ; and can not exist without the authority of law. But it need not be shown that it is created by express enactment. It may arise from long recognized rights, countervailed by no legislative action. African slavery is thus recognized in Kentucky, and the judges of the Supreme Court of the United States, whose jurisdiction is co-extensive with the country, are bound to take judicial notice of its existence in those States where it prevails.

The constitution of the United States did not leave the enforcement of the provisions for the reclamation of slaves with the States. It vested that power in the government of the United States. This doctrine was affirmed by the Supreme Court of the United States in *Prigg v. Pennsylvania*, 16 Peters 539, has been denied by no respectable State court, and has been sustained by the action of the legislative department of the government.

In proceedings, under the fugitive slave law, the inquiry is not strictly whether the fugitive be a slave, or a freeman, but whether he owe service to the claimant. The decision, upon that question, is no bar to an inquiry in the proper tribunal, as to the personal status of the fugitive. The examination is preliminary, and not a final adjudication.

The seventh amendment to the constitution, preserving the right of trial by jury in all suits at common law, where the value in controversy exceeds twenty dollars, does not apply to an examination as to the claim for services under this law. Such an examination is not a proceeding at common law, but a statutory one.

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The presumption of freedom attaches to every resident of a free State, without regard to color ; and on the same principle, in a slave State, every colored man is presumed to be a slave.

It is not necessary, under the act of 1850, to produce the record showing the status of the fugitive in another State. The fact that he owes service may be established by ether, and oral testimony.

Mr. *Ware* for the claimant.

Messrs. *Joliffe* and *Birney* for the fugitive.

OPINION OF THE COURT.

An affidavit being made on the 16th day of August, 1853, that George McQuerry was illegally imprisoned, he was brought before Judge McLean, that the cause of his detention might be inquired into.

The plaintiff, as above stated, objected to the discharge of McQuerry, on the ground that he was held by him as a fugitive from labor. After the evidence was heard, and the facts relied on by the defendant's counsel were admitted by the plaintiff ; and after the counsel on both sides had argued the facts, and the law of the case, the judge proceeded to give his opinion.

After stating how the cause came before him, he observed, " The right of the claimant to the services of the defendant is the first point to be examined. If the claim as made has been proved, then the detention is not illegal.

Jacob Miller, the son of the claimant, was first examined. He is twenty-one years of age. His father resides in Washington county, Kentucky. He has known the fugitive ever since he can remember, as the slave of his father. A little more than four years ago, he absconded from the service of his father, in company with three others, who were also the slaves of his father. The mother of the fugitive came to his father through the mother of the witness. The fugitives were advertised shortly after they absconded, and a reward of four hundred dollars was offered for their return. They

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were pursued by different persons, but were not overtaken. One of them was arrested, at Louisville, and returned, but shortly after he again absconded.

When Wash., as the fugitive was generally called, was lately arrested, at Troy, in Ohio, he said nothing about being free, but observed that he had no intention to run off an hour before he started ; that he was persuaded to do so by Steve, one of the individuals who accompanied him.

William Kelly—Is twenty-three years old, lives in the same county of Washington, within two and a half miles of the claimant, and for nine or ten years has known Wash. to be the servant of the claimant. He lived with the complainant as his other slaves, and was subject to his control. He ran away from his master better than four years ago. Was present when Wash. was arrested near Troy a day or two ago. Wash., at first, did not recognize him, but did so after a little conversation. He told the witness that he was sorry he left Kentucky ; did not intend to go an hour before he left, and that he was persuaded to leave by Steve.

James Kelly—Aged twenty-eight years ; is brother of the above witness. Has known Wash. eleven years as the slave of the claimant. He corroborates the statements of the preceding witness as to the absconding of Wash., that he was advertised, admitted the right of his master, as stated by the other witnesses.

Isaiah Yoker—Lives in the same county, has known Wash. as the slave of the complainant twelve or thirteen years. He corroborates the other statements made by the witnesses examined before him.

Mr. Trader—Is a deputy marshal, and resides at Dayton. He arrested the fugitive, who said that the claimant was his master, and that he had always been well treated.

Mr. Black—Is also a deputy marshal. He heard Wash. say that the claimant was his master, and that he had been well treated. That he had been persuaded to run away.

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As a matter against the right of the claimant it is admitted, that the defendant has resided four years in Ohio, and conducted himself well, being considered as a free man.

From the facts proved, there can be no doubt that the fugitive, under the laws of Kentucky, is the slave of the claimant, and that he absconded from his service a little more than four years ago. The testimony is clear on this point. No attempt has been made to controvert the facts, or to impeach the credibility of the witnesses. Of the many cases my judicial duties have required me to examine, where damages were claimed for aiding the escape of fugitives from labor, no case has been proved with more distinctness and fullness than this one. No one capable of comprehending evidence can doubt, that the fugitive lived with the claimant, as his slave, for many years, and that he left that service, without the leave of his master, several years ago.

No proof, it is contended, has been offered to show that Kentucky is a State in which slavery is authorized by law. And a discussion in the Senate of the United States is referred to, in which certain Senators declared that there was no law in the South expressly establishing slavery. It is with regret that I hear this argument relied on in this case. It was used by gentlemen of the South, to justify the introduction of slavery into our territories, without the authority of law. In *Groves v. Slaughter*, a Mississippi case, reported in 15 Peter's R. 450, the Supreme Court of the United States declared, that slavery was local, and that it could not exist without the authority of law. That it was a municipal regulation.

Whether this law was founded upon usage, or express enactment, is of no importance. Usage of long continuance, so long that the memory of man runneth not to the contrary, has the force of law. It arises from long recognized rights, countervailed by no legislative action. This is the source of many of the principles of the common law. And

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this for a century or more may constitute slavery, though it be opposed, as it is, to all the principles of the common law of England. I speak of African slavery.

But such a law can only acquire potency by long usage. Now it may be admitted that in some of the southern States, perhaps in all of them, there can not be found a statute which contains the words, "And be it enacted that slavery shall exist;" and this was what was denied in the Senate. But this does not shake the decision of the Supreme Court, above referred to. Usage, of great antiquity, acquires the force of law. The denial, therefore, that slavery existed by virtue of an express law, or by statute law, which was intended to be denied, was no denial at all. But no usage can acquire the force of law, except it has been long recognized as the basis of action, and as the principle on which the rights of property are maintained.

There is no slave State, where the existence of slavery is not recognized and maintained, by numerous statutes and judicial decisions. The statute books of the South are full of such enactments. The relation of master and slave is fully recognized, and, to some extent, regulated. The decision of the Supreme Court above referred to settles a most important principle. And I have no regrets that I was the means of inducing that decision.

It gives the proper limitation to slavery. It can not be extended beyond the jurisdiction of the States sanctioning it, and can not, legally, be affected by the legislative action of any free State. The principle, I believe, was sanctioned by the southern States, and was not controverted by any non-slaveholding State. On the question of slavery in our territories, this doctrine was first departed from.

The Supreme Court has long since held that that court and its judges recognize, without proof, the laws of the several States and territories. The jurisdiction of that court, and of its members, extends throughout the Union. In the

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respective States they administer the local laws, so that the laws of the States come under their special cognizance in acting upon individual rights.

Kentucky is a slave State. Except in regard to land titles, no other subject has been more productive of legal controversy than contracts arising out of slavery.

It is contended that the law authorizing the reclamation of fugitives from labor is unconstitutional. That the constitution left the power with the States, and vested no power on the subject in the Federal government.

This argument has been sometimes advanced, and it may have been introduced into one or more political platforms. In regard to the soundness of this position, I will first refer to judicial decisions. In the case of *Prigg v. The State of Pennsylvania*, 16 Peter's R. 539, the judges of the Supreme Court of the United States, without a dissenting voice, affirmed the doctrine, that this power was in the Federal government. A majority of them held that it was exclusively in the general government. Some of the judges thought that a State might legislate in aid of the act of Congress, but it was held by no one of them, that the power could be exercised by a State, except in subordination of the Federal power.

Every State court which has decided the question, has decided it in accordance with the view of the Supreme Court. No respectable court, it is believed, has sustained the view that the power is with the State. Such an array of authority can scarcely be found in favor of the construction of any part of the constitution, which has ever been doubted. But this construction, sanctioned as it is by the entire judicial power, State as well as Federal, has also the sanction of the legislative power.

The constitution of the United States, it will be observed, was formed in 1787. Afterwards it was submitted to the respective States for their ratification. The subject was not only largely discussed in the Federal convention, but also in

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every State convention. No question has ever arisen, in regard to our Federal relations, which was of equal importance to that of the adoption of the constitution ; none in our political history was more thoroughly discussed. The men of that day may be emphatically said to have understood the constitution.

In a very few years after the constitution was adopted by the States, the fugitive act of 1793 was passed. That law is still in force, except where the act of 1850 contains repugnant provisions. In the Congress which enacted the act of 1793, it is believed, that some of the members had been members of the convention. They could not have been ignorant of the provision of that instrument. And by the passage of that act they exercised the power, as one that belonged to the Federal government. Here is a force of authority, judicial, and legislative, which can not be found on any other seriously litigated point in the constitution.

Such a weight of authority is not to be shaken. If the question is not to be considered authoritatively settled, what part of that instrument can ever be settled ? The surrender of fugitive slaves was a matter deeply interesting to the slave States. Under the confederation there was no provision for their surrender. On the principles of comity amongst the States the fugitives were delivered up ; at other times they were protected and defended. This state of things produced uneasiness and discontent in the slave States. A remedy of this evil, as it was called, was provided in the constitution.

An individual who puts his opinion, as to the exercise of this power, against the authority of the nation in its legislative and judicial action, must have no small degree of confidence in his own judgment. A few individuals in Massachusetts may have maintained, at one time, that the power was with the States ; but such views were, it is believed, long since abandoned, but they are reasserted now, more as a matter of expediency than of principle.

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But whether we look at the weight of authority against State power as asserted, or at the constitutional provision, we are led to the same result. The provision reads : "No person held to service or labor in one State, under the laws thereof, escaping into another, shall in consequence of any law or regulation therein, be discharged from such service or labor ; but shall be delivered up on claim of the party to whom such service may be due."

This, in the first place, is a federal measure. It was adopted by the national convention, and was sanctioned as a federal law, by the respective States. It is the supreme law of the land. Now a provision which can not be enforced, and which has no penalty for its violation, is no law. The highly respectable gentleman who read an ingenious argument in support of these views, is too good a theologian to contend that any rule of action which may be disregarded without incurring a penalty, can be law. It may be a recommendation, but it can not be a law. This was the great objection to the articles of confederation. There was no power to enforce its provisions. They were recommendatory, and without sanctions.

There is no regulation, divine or human, which can be called a law, without a sanction. Our first parents, in the garden, felt the truth of this. And it has been felt by violators of the divine or human laws throughout the history of our race.

The provision in the constitution is prohibitory and positive. It prohibits the States from liberating slaves which escape into them, and it enjoins a duty to deliver up such fugitives on claim being made. The constitution vests no special power in Congress to prohibit the first, or to enforce the observance of the second. Does it, therefore, follow that effect can be given to neither, if a State shall disregard it ?

Suppose a State declares a slave who escapes into it shall be liberated, or that any one who shall assist in delivering

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him up shall be punished. If this power belongs to the States, and not to the Federal government, these regulations would be legal, as within the exercise of their discretion. This is not an ideal case. The principle was involved in the Prigg case, and the Supreme Court held the act of the State unconstitutional and void.

It is admitted that there is no power in the Federal government to force any legislative action on a State. But, if the constitution guarantees a right to the master of a slave, and that he shall be delivered up, the power is given to effectuate that right. If this be not so, the constitution is not what its framers supposed it to be. It was believed to be a fundamental law of the Union. A federal law. A law to the States and to the people of the States. It says that the States shall not do certain things. Is this the form of giving advice or recommendation? It is the language of authority, to those who are bound to obey. If a State do the thing forbidden, its act will be declared void. If it refuse to do that which is enjoined, the Federal government, *being a government*, has the means of executing it.

The constitution provides, "that full faith shall be given to public acts, records, and judicial proceedings," of one State in every other. If an individual claiming this provision as a right, and a State court shall deny it, on a writ of error to the Supreme Court of the Union, such judgment would be reversed. And the provision that, "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Congress unquestionably may provide in what manner a right claimed under this clause, and denied by a State, may be enforced. And if a case can be raised under it, without any further statutory provisions, so as to present the point to the Supreme Court, the decision of a State court, denying the right, would be reversed. So a State is prohibited from passing a law that shall impair the obligations of a contract. Such a law the

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Supreme Court has declared void. In these cases, and in many others, where a State is prohibited from doing a thing, the remedy is given by a writ of error, under the legislation of Congress. The same principle applies in regard to fugitives from labor.

A fugitive from justice may be delivered up under a similar provision in the constitution. It declares that, "A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." This is contained in the same section as the clause in relation to fugitives from labor, and they both stand upon the same principle. In both cases Congress has provided a mode in which effect shall be given to the provision. No one, it is believed, has doubted the constitutionality of the provision in regard to fugitives from justice.

The men who framed the constitution, were adequate to the great duties which devolved upon them. They knew that a general government was essential to preserve the fruits of the revolution. They understood the necessities of the country. The articles of confederation had been found as a rope of sand, in all matters of conflict between the different States, and the people of the different States. Without a general government, commerce could not be regulated among the States, or with foreign nations; fugitives from labor could not be reclaimed; State boundaries could not be authoritatively established.

I am aware it has been stated, that the subject of slavery was not discussed in the convention, and that the reclamation of fugitives from labor was not, at that time, a subject of much interest. This is a mistake. It was a subject of deep and exciting interest, and without a provision on the subject no constitution could have been adopted. I speak from in-

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formation received from the late Chief Justice Marshall, who was one of the chief actors in that day, than whom no man then living was of higher authority.

The want of a general regulation on the subject of fugitives from justice and from labor was felt, and the above provisions in the constitution were intended as a remedy. It has proved to be an adequate remedy as against fugitives from justice. In no instance, it is believed, has the constitutionality of this provision been doubted. But the provision in relation to fugitives from labor, resting upon the same principle, is now opposed.

If the introduction of this provision into the fundamental law of the Union, was not intended to operate as the law of the Union—if it was recommendatory in its character only—it was useless. The power to surrender fugitives from labor, under the confederacy, was with each State. It could be done, or refused, at the discretion of the State. Did the framers of the constitution intend to leave this matter as it was under the confederation? The provision introduced shows an intention to make some provision on the subject. But by the argument, it is said, the provision made left the power with the States, and did not vest it in the general government. The answer to this is, it was in the States before the provision, and on this view, it added nothing to the power of the States. If such be the true construction of the provision, it fixes an act of consummate folly on the framers of the constitution, and on the members of the State conventions who adopted it. In laying the foundation of a general government, they incorporated into the fundamental law a useless provision, and omitted to provide for an emergency which was felt and complained of in one half of the States. The men of that day were not likely to be guilty of such an omission. They understood the Federal and State powers too well, not to know that without some effective provision on this subject, the superstructure which they were about to

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rear would soon be overthrown. These were the circumstances under which the constitution was framed and adopted. With the abstract principles of slavery, courts called to administer this law have nothing to do. It is for the people, who are sovereign, and their representatives, in making constitutions, and in the enactment of laws, to consider the laws of nature, and the immutable principles of right. This is a field which judges can not explore. Their action is limited to conventional rights. They look to the law, and to the law only. A disregard of this, by the judicial powers, would undermine and overturn the social compact. If the law be injudicious or oppressive, let it be repealed or modified. But this is a power which the judiciary can not reach.

The citizen of a slave State has a right, under the constitution and laws of the Union, to have the fugitive slave "delivered up on claim being made," and no State can defeat or obstruct this constitutional right. The judiciary power of the Union has the primary or eventual power to determine all rights arising under the constitution. This will not be controverted by any legal mind, which has properly investigated the great principles of the constitution. And the question now made is not, in principle, different from a numerous class of cases arising under powers prohibited to the States.

The worthy and estimable gentleman who read an argument on this occasion, in commenting on the cases covered by the fugitive law, embraced all cases of contract, and even that between a minister and his congregation. He supposes if the minister should leave his congregation before his stipulated engagement had transpired; that he was liable to be arrested and returned to his congregation under the fugitive law.

This is a case, under this law, which no one before has supposed to be embraced by it. And if the law did cover

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such a case, it would be the most difficult to carry out of any other which has been imagined. If the minister could be returned, neither the court nor the congregation could compel him to preach. No profession or class of men would be less likely to do anything on *compulsion*.

But the law applies to no case of contract. Where the parties to the agreement are capable of making a contract, the remedy for a breach of it is by action at law. In the case of slaves and of apprentices, there is no remedy against the individual who absconds, by an action.

Various objections are stated to the fugitive slave law of 1850. The duties of the commissioners, the penalties inflicted, the bribe secured to the commissioner, for remanding the fugitive, are all objected to as oppressive and unconstitutional. In regard to the five dollars, in addition, paid to the commissioner, where the fugitive is remanded to the claimant, in all fairness, it can not be considered as a bribe, or as so intended by Congress ; but as a compensation to the commissioner for making a statement of the case, which includes the facts proved, and to which his certificate is annexed. In cases where the witnesses are numerous, and the investigation takes up several days, five dollars would scarcely be a compensation for the statement required. Where the fugitive is discharged, no statement is necessary.

The powers of the commissioner, or the amount of the penalties of the act, are not involved in this inquiry. If there be an unconstitutional provision in an act, that does not affect any other part of the act. But I by no means intimate that any part of the act referred to is in conflict with the constitution. I only say that the objections made to it do not belong to the case under consideration.

The act of 1850, except by repugnant provisions, did not repeal the act of 1793. The objection that no jury is given does apply to both acts. From my experience in trying numerous actions for damages against persons who obstruct-

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ed an arrest of fugitives from labor, or aided in their escape, I am authorized to say, that the rights of the master would be safe before a jury. I recollect an instance where a strong anti-slavery man, called an abolitionist, was on the jury in a case for damages, but who, being sworn to find as the evidence and the law required, agreed to a verdict for the plaintiff. He rightly determined that his own opinions could not govern him in deciding a controversy between parties, but that under his oath he was bound by the law and the evidence of the case.

It was in the power of Congress to give a jury in cases like the present, but the law contains no such provision, and the question raised is, whether the act without it is constitutional.

This question has been largely discussed in Congress, in the public press, and in conventions of the people. It is not here raised as a question of expediency or policy, but of power. In that aspect only is it to be considered.

The act of 1793 has been in operation about sixty years. During that whole time it has been executed as occasion required, and it is not known that any court, judge, or other officer has held the act, in this, or in any other respect, unconstitutional. This long course of decision, on a question so exciting as to call forth the sympathies of the people, and the astuteness of lawyers, is no unsatisfactory evidence that the construction is correct.

Under the constitution and act of Congress, the inquiry is not strictly whether the fugitive be a slave or a freeman, but whether he owe service to the claimant. This would be the precise question in the case of an apprentice. In such a case the inquiry would not be, whether the master had treated the apprentice so badly as to entitle him to his discharge. Such a question would, more probably, arise under the indenture of apprenticeship, and the laws under which it was executed. And if the apprentice be remanded to the service

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of his master, it would in no respect affect his right to a discharge, where he is held, for the cruelty of his master or any other ground.

The same principle applies to fugitives from labor. It is true in such cases evidence is heard that he is a freeman. His freedom may be established, by acts done or suffered by his master, not necessarily within the jurisdiction where he is held as a slave. Such an inquiry may be made, as it is required by the justice of the case. But on whatever ground the fugitive may be remanded, it can not, legally, operate against his right to liberty. That right when presented to a court in a slave State, has, generally, been acted upon with fairness and impartiality. Exceptions to this, if there be exceptions, would seem to have arisen on the claims of heirs or creditors, which are governed by local laws, with which the people of the other States are not presumed to be acquainted.

If a fugitive from labor, after being liberated by a judge or commissioner, should voluntarily return to his master, southern courts have held that his original status would attach to him; he would be held as a slave. And, of course, the decision of the judge or commissioner, having been that he did not owe service to the claimant, could not operate as a bar to the rights of the master. The claim to freedom, if made, in the slave State, would be unaffected by the preliminary inquiry and decision. That decision is, that the slave does, or does not, owe service to the claimant. It does not finally establish the fact, whether the fugitive is a freeman or a slave. If the decision on such an inquiry as this, should finally fix the seal of slavery on the fugitive, I should hesitate long, notwithstanding the weight of precedent, without the aid of a jury, to pronounce his fate. But the inquiry is preliminary, and not final.

It is true, it may be said, that the power of the master may be so exercised as to defeat a trial for the freedom of the

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fugitive. This must be admitted, but the hardship and injustice supposed arises out of the institution of slavery, over which we have no control. Under such circumstances, we can not be held answerable.

It may be said that the seventh article in the amended constitution which gives a trial by jury, "where the value in controversy shall exceed twenty dollars," does not apply to a case like this. The provision is, "in suits at common law." This is not strictly a proceeding at common law. The common law is opposed to the principle of slavery. The proceeding is under constitutional and statutory provisions, under the forms specially provided, and not according to the course of the common law.

This is represented to be an *ex parte* proceeding. It does not bear this character. Had it been represented to me, that the fugitive could produce evidence conducing to prove that he did not owe service to the claimant, time would have been given to procure the evidence. The only allegation, as to what the counsel expected to prove by absent witnesses, was, that the fugitive had resided in Indiana and Ohio four years, and that he was esteemed and considered a freeman. This the counsel for the claimant admitted, and as no further allegation of evidence was alleged to be in the power of the party, of course there was no ground for a postponement.

The presumption of freedom attaches to every resident of a free State, without regard to color; and, on the same principle in a slave State, every colored man is presumed to be a slave. But this presumption, in this case, is counteracted by the facts proved.

It is argued, that the evidence is defective, as the record showing the status of the fugitive, as authorized by the act of 1850, is not produced. Such record is not necessary to establish the right of the claimant. If it were produced, the identity of the fugitive would still be an open question. On

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the question of identity, anything which conduced to prove that the person described in the judgment was not the one before the judge or commissioner, would be admissible.

I am gratified with the gentlemanly bearing and courtesy with which this argument has been conducted. It was due to the occasion and the circumstances. No other course was expected.

Upon the whole, no doubt can exist on the evidence, that the fugitive owes service to the claimant; and, under the law, I am bound to remand him to the custody of his master, with authority to take him to the State of Kentucky, the place from whence he fled.

CIRCUIT COURT OF THE UNITED STATES.

MICHIGAN—JUNE TERM, 1853.

JOHN PECK, SURVIVOR, &c. v. WILLIAM C. PEASE.

The governor and judges in the first stages of the territorial government of Michigan had power to adopt the laws of the respective States, but had no legislative authority.

A law adopted from Vermont in 1820, was adopted in the statute of limitations, in which the word "or" was used instead of the word "and," giving the benefit of the statute to a person beyond the limits of the State, whereas the Vermont statute required the person not only to be beyond the limits of the State, but of the United States.

In 1825 a commission to revise the laws, which was authorized to alter, or report new bills, &c.—the report included the law in question, with others, and in 1827 all the laws in force were published by authority—there being no alteration in this act.

There was another revision of the laws in 1833, which was again published by authority, making no alteration in this act.

Held that under the circumstances the court could not look back to the law of Vermont to correct any error on the first adoption of the law.

Mr. *Barstow* for the plaintiff.

Mr. *Emmons* for the defendant.

OPINION OF THE COURT.

This is an action of debt, brought on a judgment rendered in the Territorial Court of Michigan in 1836. There are counts in the declaration on a promissory note.

Among other defences, the defendant pleaded the statute of limitations. The plaintiff replied that he was beyond seas, to wit: in the State of New York, to which replication the defendant demurred. The 10th section of the act of limitation of 1820, which act was adopted by the Governor and Judges of the Territory, provides, "that this act shall not extend to bar any infant, feme covert, person imprisoned, or beyond seas, or without the United States," &c., from bringing either of the actions before mentioned within the term before set and limited for bringing such actions, calculating from the time such impediment shall be removed. The limitation of all actions on judgments was eight years next after the rendition of such judgments; on promissory notes attested, eight years; if not attested, six years.

The above section was printed in the act of 1820, and in all the revised laws up to 1838, and no doubt has arisen as to its construction. The words "or beyond seas," have been uniformly construed to mean, without the State, by the courts of Michigan and of the United States, sitting within the Territory of the State of Michigan. But it is alleged that within *a few years*, on the examination of the records in the office of the Secretary of State, it is found that the words "beyond seas" were erased in the original bill, as appears from a note on the margin of the record, though they are copied in the body of the record. And the Secretary of State certifies, that the marginal note appears to have been made in the same handwriting, with the same ink and pen as the body of the record. Omitting the words erased, the saving clause would read, "or without the United States," which would

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exclude the plaintiff from the benefit of the statute, as he avers himself to be a citizen of New York.

Under the first grade of the territorial government of Michigan, the Governor and Judges were authorized by the ordinance of 1787, to "adopt" laws of the original States, for the government of the Territory, and the law in question seems to have been adopted from the State of Vermont. They had no legislative power, consequently they had no power to modify or alter the laws they adopted.

The words used in the Vermont law are, "or beyond seas, without the United States." To be within the exception, *it is admitted, an individual must not only be beyond seas, but without the United States.* The words "beyond seas" in the Vermont statute must have been used for some purpose, and they should not have been erased from the adopted statute.

The production of the original bill as adopted by the Governor and Judges, would be more satisfactory than the record of it. I am not aware that there was any law requiring this record, or making a certified copy of it, evidence. But be this as it may, conceding that this bill when reported was as certified from the record, it becomes a serious question whether that can now be held as the law.

There can be no doubt, that a case may arise in which the original bill as enacted or adopted may be referred to, to correct an error in the printed act. And in such a case the court are to judge by inspection, and not a jury. It is true that an issue of nul tiel record is sometimes, in New York, and perhaps in other States, concluded to the contrary; but the variance is much more appropriately referred to the court. And so in regard to variance between the printed statute, and the original enrolled bill. If a question of fraud arises in regard to the alteration, it should be referred to a jury.

On the 21st of April, 1825, the legislative council of Michigan appointed certain individuals to revise the laws of the

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Territory of Michigan, and they were required to examine all the laws then in force, and to revise, consolidate, and digest the same, upon the following principles: First—All the acts upon the same subject shall be digested into the same act. Second—The principles of the existing acts may be preserved, or such alterations or additions may be made as the said commission may deem expedient. Third—Acts not considered necessary by the Commission may be omitted, and deficiencies may be supplied by new acts, &c.

On the 27th of December, 1826, the Commissioners made their report to the legislative council of the Territory, and they say: "Aware of the importance of the trust confided to them, and of the deep interest the community necessarily has in its faithful execution, they have been solicitous and persevering in their endeavors so to amend, simplify, and generally to improve the statutes, as that most of the evils and inconveniences under the present system may be removed."

And they further say: "Upon the principles of existing acts, and in making such alterations and additions as the Commission might deem expedient, they have, according to the direction of the legislative council, exercised fully the powers with which they were invested."

"Considerable alterations and several additions have been made in many of our present statutes, wherever practical evils have already been found to arise in the protection of private rights," &c. "Great care, however, has been taken, in making such alterations, not to infringe upon principles long established, and which in their application have generally been found convenient and salutary," &c. "They have, in a few instances, altogether omitted a statute, and in many others have found it necessary to report those which were entirely new."

On the 29th of December, 1826, Mr. Dole, of the legislative council, moved that said Commissioners be discharged from the duties imposed by the resolutions of the legislative council

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of the 21st April, 1825, and that the report now before the council be *accepted*; and the motion was decided in the affirmative.

The legislative council, on the 13th of April, 1827, by a resolution, required the Governor to have a proper index, and marginal notes prepared for the volume of laws passed at that session; and also a translation and explanation of such Latin or technical words and phrases as may appear to require the same, &c. And there was annexed to the volume of laws, reported by the Commissioners, and published by the Legislature, the explanations and notes required by the resolution.

At the last term of the court, when this question was before us, in recognizing the printed act as the law, we relied chiefly on this revision of the statutes. At the present term, on an application to the court to reconsider their former decision on this subject, I was startled at the assertion confidently made, that there was no evidence in the acts of the legislative council which showed a *sanction* or *adoption of the laws revised*; although ever since the publication of the volume, it had been received and acted upon by the courts of the State and of the United States, as containing the laws of Michigan. And it was said that the revision referred to was nothing more than a reprint of the laws. This announcement, made by gentlemen of the bar, was so novel and startling, that in my own mind I at once determined to inquire into the facts asserted.

I am exceedingly gratified that this re-investigation has been had, as it has convinced us, beyond a doubt, of the soundness of our former decision.

We are requested to defer any action on this question, as it is pending before the Supreme Court of this State, and in a short time must be decided by that tribunal. And we learn that a similar question has been decided informally, on the circuit, by one of the judges of the Supreme Court. On further examination, it seems that no such decision has been made by one of the Supreme Judges of the State, and this

court would not do the injustice to any member of that court, to consider as a decision, a casual remark, not intended by him to be a judgment of the court.

This court have shown no unwillingness to follow the settled construction of the statutes of the State, by the Supreme Court of Michigan. In one case, at least, we have done so, by overruling our own deliberate convictions, elaborately expressed, before the State Court had given an opinion. I refer to the general act incorporating banks in Michigan.

In no proper sense can the question before us be considered the construction of a State statute. The act of limitations, as it formerly stood upon the statute book of the State, is clear and unambiguous. It has uniformly been construed in the same way, first, by the Territorial and afterward by the State Courts of Michigan. And the attempt is now made to go back to the adoption of that law, under the federal jurisdiction, to show that it was inaccurately printed. This, in our judgment, can be of no importance; if the revision of the laws under the resolution of the 21st of April, 1825, was sanctioned by the State. The power of commissioners was limited only by their discretion, and extended to all public acts then in force in the Territory. And in their report they say that they have fully exercised the powers vested in them. Some acts they modified, they made additions to others, and some they reported entirely new. Some acts were reported without change. Now in regard to such acts, the judgment of the Commissioners was as much exercised as where alterations were made. They examined these acts, and believing their provisions to be salutary, they reported them without modification. They were reported by the Commissioners, adopted by the legislature, and published as laws in the volume of 1827, and they have been so received and acted upon by all the public authorities from that time to the present.

It is objected that the laws contained in this volume have not been formally enacted and adopted. The report was

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"accepted" without alteration ; the laws were reported as laws, having the forms of enactments, and they were "accepted" as such. Whether the word "adopted" would have been a more appropriate word, can be of no importance. The word "accepted" is sufficiently significant. It shows the sanction of the legislative council to the laws as reported, and the future action of the same body, in the printing and distribution of the volume, and the subsequent recognition of the laws by the public authorities of the country, State and Federal, puts to rest all question as to their validity.

The validity of laws reported by the Commissioners depends upon the sanction given to them by the Legislative Council. No law contained in that report can derive any force from its original adoption by the Governor and Judges. The Commissioners had power to reject or modify those laws, or to substitute others in their place. If the origin of the law may be examined as a test of its validity, what is to be the test of those laws altered by the Commissioners, or of those which they originated ? Such an idea is inadmissible. The laws derive their validity from the action of the Commissioners, sanctioned by the law-making power. And this applies as well to laws reported without alteration, as to those altered or originated by them.

If validity be not imparted to them in this manner, who can measure the extent of injury which must result to society ? For nearly thirty years the laws reported by the Commissioners have been the basis of contracts—of judicial action. Rights in the Territory and in the State have grown up under their protection. If all of them are to be declared void, except those adopted by the Governor and Judges, as they must be if they never had the legislative sanction, and especially those altered by the Commissioners, and those which they originated, no one can see the effect on established rights. To avoid such consequences, under the circumstances, and after so great a lapse of time, the doctrine

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of presumption might be relied on. Acts of Parliament have been presumed—not because such acts had been passed, but on the ground of public policy. No such presumption is necessary in the case before us. We have the action of the Legislative Council adopting the reports of the Commissioners. The rules ordinarily applied in a legislative body, in acting upon the report of a committee, had no application in this case. The laws reported were matured in form and substance, and required only the legislative sanction to give effect to them: and that was given. The signature of the Governor, if necessary, would be presumed.

This whole proceeding in regard to the adoption of the laws by the Governor and Judges, and also, the action of the Commissioners, and the legislative action of the Council, took place under the authority of the United States: and, we suppose the courts of the United States are the proper tribunals to determine the effect of such a procedure. In this respect, the State courts would not seem to have the power to establish the rule of construction which this court will follow, as of an ordinary statute of the State.

By the act of the 13th of April, 1827, the Legislative Council of the Territory declares, “that all acts in force on the first day of November last, are repealed, with certain exceptions.” And by the second section of that act, it is declared “that all acts passed since the first day of November last, shall be in force and take effect on the 1st day of January next.” This embraces the acts reported by the Commissioners, and sanctioned by the Legislative Council, and is conclusive.

The statute of limitations was reported by its title in the form as originally adopted, and this sanctions the form as it now stands. And whether it was altered by Commissioners or not can be of no importance. The provisions, as they stand, were sanctioned by the report, and we can not look behind it for the law. Admit the mistake occurred, as alleg-

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ed, originally in copying the law, this report of the Commissioners is binding, and embodies the law, as authoritatively published in the laws.

And afterwards, in the year 1833, there was a second revision of the laws, in which the section of the statute in question was again adopted and authoritatively published, and remained and was acted on as the law of Michigan until the year 1838.

To hold that, under such circumstances, we must go back to the first adoption of this law by the Governor and Judges, would disregard the rights of parties for many years, and, as it seems to us, the settled rules of construction.

It is alleged by counsel that in the case of *Brown v. Brown*, there was a decision in this court adverse to the one made in this case. In that case the statute of limitation was pleaded. The plaintiff replied that she was beyond seas, to wit: in the State of New York, the defendant demurred, and at the October term of 1841, the court held that the words "beyond seas" were equivalent to beyond the jurisdiction of the State. The demurrer was therefore overruled.

At the June term, 1845, an affidavit being made in the same case, and certified copies produced, showing that the words "beyond seas" had been erased from the original bill, as appeared from the record of it in the Secretary of State's office, the counsel agreed to set aside the former judgment, and entered a judgment sustaining the demurrer. This was done by the counsel without argument, and without calling the attention of the court to the subject. An entry thus made is not an authority to be cited in other cases. There was, in fact, no judgment of the court. Counsel, however agreed, can not consent to a decision, without a judgment of the court, so as to make it an authority.

On inquiry, we are informed that in 1827 laws were adopted by the Governor and Judges, by copying them into a record, and that no original bills were made out. The record was, in

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effect, the original bill, so adopted. And it appears that the Commissioners under the act of 1827, where no alterations were made in acts, reported them by their titles.

We adhere to our former decision in overruling the demurrer in this case, and hold that the statute of limitations adopted in 1820 by the Governor and Judges, had the force of law, after it was reported by the commissioners, as all other laws embraced in that report, not by virtue of their original adoption, but in virtue of their being so reported and adopted by the law-making power. The motion to reconsider the decision of the last term is overruled.

LEVERETT BISSELL *v.* THE FARMERS' AND MECHANICS' BANK OF MICHIGAN.

The brother of the complainant owed the defendant a debt exceeding five thousand dollars, for which he had given a mortgage on certain lands in Ohio, and a lien on twenty-two shares of railroad stock on the Erie and Kalamazoo road.

The bank proposed to its debtor, Edward Bissell, that he should substitute mortgages on property in the State of Michigan for the Ohio mortgages. The debtor proposed to give the bank a mortgage on a farm in Lenawee county, which was owned by his brother, the complainant, but the title was held in trust by Edward.

The Bank acceded to the proposition, and a mortgage was executed by the complainant and his brother.

And it was afterwards agreed that so soon as a claim, under an attachment, should be removed from the Lenawee farm, a deed should be executed for it to the Bank, and the Bank should transfer to the complainant the Ohio mortgages, and transfer the railroad stock. The substance of this agreement was drawn up in writing, and was left, with other papers, in the hands of Mr. Walker, to be delivered to the respective parties, on the embarrassment on the title being removed.

A motion was made to set aside the attachment, which failed.

On this, Mr. Walker delivered up the papers.

The Bank afterwards applied to be put in possession of the farm, to defend

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the suit against the attachment claim. On which defense the claim was held void.

The Bank remains in possession, receiving rents and profit.

The complainant filed his bill for a specific performance.

The court decreed a specific performance—requiring complainant to pay costs on attachment and ejectment. Also that the statute of frauds does not apply. That Edward Bissell was a competent witness, &c.

Mr. Campbell for complainant.

Messrs. Barstow & Lockwood for defendant.

OPINION OF THE COURT.

This is a bill for a specific performance. In May 1838, Edward Bissell, a brother of the complainant, being indebted to defendant in the sum of \$5,634 21, gave a mortgage on certain property in Toledo, and a pledge of stock in the Erie and Kalamazoo Railroad Company. In December of the same year, the defendants being anxious to have Michigan securities, as they represented, rather than the securities on Ohio property, proposed to Edward Bissell to give it security on a farm in Lenawee county, Michigan, which was held in his name, but which belonged to complainant, and was held in trust for him by Edward. That Edward Bissell informed the agents of the Bank, John A. Wells, the Cashier, and Henry N. Walker, that the title to the above land was as stated, but that he thought his brother would agree to let him mortgage it for the debt due the defendant, if defendant would assign to him the other securities, the Ohio mortgage and stock, in exchange.

The bill further states that defendants, by their agent, agreed to the proposition, as soon as it could be ascertained that a valid title could be made for the farm, on which an attachment against Edward Bissell had been laid, the validity of which was in dispute, and, accordingly, a mortgage was made and delivered to defendant.

And it is stated that defendant further agreed, that if the attachment proceedings could be set aside or declared void,

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they would receive the fee of the Lenawee farm, and transfer the securities above stated. That in pursuance of this agreement a deed in fee was made, afterward, in due form, for the farm, and placed as an escrow, in the hands of Henry N. Walker, to be delivered to defendant whenever the attachment proceedings should be set aside or declared void. At the same time, with the deposit of this deed, the defendant executed an agreement in writing, and put it in Mr. Walker's hands, agreeing to transfer the securities named to complainant, in case the title to the Lenawee farm should prove good, and deposited as an escrow, at the same time, the necessary transfers and papers to be delivered to complainant in that event.

After this a motion was made to set aside the attachment proceedings in the name of Edward Bissell, the defendant, which failed; and immediately afterward the defendant applied to Mr. Walker for a return of the papers, and he, supposing that the matter would not be further litigated, delivered them up to the Bank, and the deed he destroyed or returned to Edward Bissell. Subsequently, and by advice of counsel, defendant determined to make another effort to try the validity of the attachment, and applied to complainant to be put in possession of the farm, and the possession was given to the bank. An action of ejectment was brought against it on the title obtained under the attachment, and the case, by writ of error, was carried to the Supreme Court of the State, and that court held the attachment proceedings were void, by which the title made to the defendant was valid.

After this procedure the complainant alleges that he repeatedly offered to make to the defendant a full and perfect title to the Lenawee farm, and requested from the bank a transfer of the Ohio mortgage and the railroad stock, and in all things to carry out the agreement on his part; but the defendant refused, although it retained possession of the farm,

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and for several years has enjoyed the rent and profit. And a specific execution of the contract is prayed.

The defendant denies that the complainant had any interest in the Lenawee farm, and alleges that the claim was set up to save the property from Edward Bissell's creditors. The giving of the mortgage is admitted by Edward, but he denies the conditions—the attachment is admitted, &c. Defendant neither denies nor admits the placing of the deed for the farm as an escrow, but denies the placing of the agreement in the hands of H. N. Walker, to transfer the Ohio and railroad security. Denies the application, as charged, for the papers, admits the possession, the action of ejectment, and the decision of the court, as stated in the bill. Answer admits that Edward Bissell stated the nature of the title to the farm, that defendant has refused, as charged, admits rents, &c. Defendant states that being dissatisfied with the Ohio securities and railroad stock, it caused Edward Bissell to be arrested in New York, and that the mortgage on the Lenawee farm was given in consideration of a discontinuance of the suit, and the release of Bissell from arrest. That defendant has paid taxes on the Ohio lands, and counsel fees on the ejectment suit. That the Lenawee farm has depreciated, and is not full security for the money and interest due.

As the decision of the case turns upon the testimony, about which the counsel differ, it is necessary to give a condensed statement of it:

Edward Bissell says, about the 9th of December, 1836, he was requested by the Cashier of the Farmers' and Mechanics' Bank to furnish securities for the payment of the above debt, situated in the State of Michigan. The Cashier expressed dissatisfaction with the security given on property in the State of Ohio, and preferred property in Michigan. The witness informed the Cashier that there was a farm in Lenawee county, State of Michigan, to which the witness held the

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title as trustee to his brother, Leverett Bissell, the complainant. That he presumed his brother would consent, that said farm should be pledged to the Bank, on condition that it would transfer to him the securities which it then held for the payment of the debt. A negotiation was finally concluded between the witness and the Cashier on that basis, or upon the understanding, that when the Bank should recover an unembarrassed title to the Lenawee county farm, it should receive the same in full payment of the debt, and transfer to his brother Leverett the mortgages on the city lots and tracts of land in Ohio, and the stock in the Erie and Kalamazoo Railroad.

This understanding was reduced to a written agreement, and signed by the Cashier, and deposited with Mr. Walker, the Attorney for the Bank, as an escrow. In pursuance of said understanding, subsequently a deed was executed by the witness and his brother, Leverett Bissell, and his wife, for the land in Lenawee county, to the Bank, and was deposited with Mr. Walker. An assignment was also executed by the Bank of the mortgage and railroad stock above stated, which was also deposited with Mr. Walker as an escrow. The consummation of the contract was postponed until the validity of a claim under an attachment, which had been laid on the property, could be ascertained. The witness had no interest in the Lenawee farm, but held it simply in trust for his brother. The witness executed a mortgage on the same to the Bank.

On cross-examination, the witness corrected his memory as to the time the written agreement was entered into, which was sometime after the parol agreement.

Mr. Walker states that sometime after the execution of the Lenawee mortgage, and before the complainant had recognized the validity of said mortgage, a negotiation was entered into between the complainant and defendant to the effect

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that, if the attachment which had been laid upon the farm could be set aside, so as to make the title to the said land good, then the defendant would, upon the complainant's releasing all equity of redemption in said land, transfer to him the mortgage or mortgages on the lots in Toledo, and the lands near that place, and assign and transfer the railroad stock taken of said Edward Bissell. This agreement was reduced to writing, and signed by the Bank and the complainant.

The complainant executed a deed with Edward Bissell, in whom was the fee of said land in Lenawee county, conveying the same to the Bank. Assignments were prepared in due form, which either were or were to be executed by the Bank, as soon as the validity of the attachment could be decided. All these papers were placed in the hands of the witness as escrows, to be delivered to the proper parties on the conditions stated. Witness thinks the written agreement was executed some eighteen months or two years after the original agreement.

Mr. Welles, the Cashier, states that it was agreed that Edward Bissell should, at his own expense, remove the attachment and perfect the title to the farm, upon doing which the Bank agreed to assign the mortgages upon the lands in Ohio to Leverett Bissell, the complainant. This agreement was one or two years after the mortgage on the Lenawee farm was executed. The witness says that about the month of March, 1842, assignments of the Toledo mortgage and of the twenty-two shares of railroad stock were prepared in form, but not executed, and also a memorandum or stipulation setting forth the agreement as before recited, as near as witness can recollect—the latter, the witness thinks, was executed, and his impression is that all these papers were left in the hands of Henry N. Walker, the Attorney of the Bank, for the purpose of being surrendered to the complainant, upon the title of

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the Lenawee farm being freed from all embarrassment. The attachment, it is proved, was the only embarrassment in the title.

When the motion to set aside the attachment failed, Mr. Walker gave up the papers, supposing that no further efforts would be made. But, afterwards, on application, the Bank was put in possession of the premises, and in the Supreme Court, the title under the attachment was held to be void.

The facts in the bill are substantially proved by the evidence. In his cross-examination, Edward Bissell corrected his memory, as to the time the papers were prepared and placed in the hands of Henry N. Walker, as escrows. This was merely a matter of time, and does not, in the least, affect the credibility of the witness.

All the witnesses agree that the Bank was desirous of exchanging its Ohio securities for a lien upon real property in Michigan. And it was agreed that a mortgage should be taken on the Lenawee farm, in Michigan, and that so soon as the title to it was cleared of all embarrassment, the arrangement should be perfected, by a deed for the farm, and a transfer of the Ohio securities and the railroad stocks to the complainant.

There is no force in the objection, that the Lenawee farm was not identified. For aught that appears, the name might have been a sufficient identification. But it was the farm on which an attachment had been laid, as the property of Edward Bissell; and, in addition to this, the Bank was put in possession of the farm, on its own application, and has remained in possession ever since, enjoying the rents.

Nor is there any difficulty as to the election of Leverett Bissell, the complainant. The title to the Lenawee farm was held by his brother Edward, in trust for him; he united in the mortgage, and in the deed that was placed in the hands of Mr. Walker, as an escrow, and in addition to these acts, he

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has filed this bill, praying a specific execution of the contract.

The principal ground assumed is, that the original contract was limited to a certain time, within which the arrangement was to be completed, which has long since transpired, and that, consequently, the complainant is not entitled to a specific execution of the contract.

In the first place, the evidence does not prove such a limitation, and if it did, the subsequent acts of the Bank showed that it was waived. After the motion failed to set aside the attachment, at the instance of the Bank, and by the advice of its counsel, it was put in possession of the farm, to try the validity of the title under the attachment. This, it is said, must have been under a new agreement, different from that set forth in the bill.

This is a mere supposition against the nature and extent of the agreement proved. The agreement was, that the deed should be delivered, and the transfer, as soon as the title to the farm should be clear of dispute. And, it is admitted, there was no objection to the title, except the claim under the attachment. Now the agreement to have the title made clear, not only embraced the motion to set aside the attachment, but also the other steps taken by the Bank in entering into the possession, and defending the title against that founded upon the attachment. This course was successful, and it was clearly within the agreement as proved. Why then should a supposition be raised, that this proceeding was under a different contract from that proved?

But the statute of frauds is interposed, to defeat the complainant's bill, on the ground that the agreement was not in writing. The substance of the agreement was in writing, as proved by the Cashier of the Bank. The transfers of the Ohio mortgages, and of the railroad stock, by the Bank, were prepared and placed in the hands of Mr. Walker, but

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were not executed, as the Cashier of the Bank states; but he says a "memorandum, or stipulation, setting forth the agreement with Bissell, as before recited, as near as witness can recollect, was executed."

Now it must be observed that the complainant consented to relinquish the Lenawee farm, provided the mortgage on the Ohio real property and the twenty shares of railroad stock should be transferred to him. The Bank has the advantage of this exchange, is in possession of the farm, enjoying the rents and profits, and it would seem that, having realized the contemplated advantage of an exchange of the securities first taken, by a surrender of the right of the complainant to the Lenawee farm, it would be inequitable to withhold from him the consideration on which he sanctioned the exchange.

The agreement in writing was delivered up by Mr. Walker, to the Bank, on the failure of the motion to set aside the attachment. The Bank, or its agent, is presumed to have possession of this paper. The agreement, as proved, being substantially in writing, the statute of frauds can have no application to the case, and the objection is limited to the parol proof of an agreement in writing.

Parol proof was properly heard of the agreement to explain the first mortgage and show the nature of that transaction. And in regard to the parol proof of the contents of the written agreement, without calling on the defendant to produce it, is an objection to the competency of evidence.

And here it may be proper to remark, that the objection, on the argument of the case, is made too late. The defense was, that there was no written agreement, and when the evidence overcame this objection, by proving the contract in writing, it is objected that before this can be done, there should have been a notice to produce the writing served on the Bank. This objection should have been made when the parol evidence was offered. No such objection appears to have been made at that time, but it is urged on the hearing,

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when the complainant has no means of removing the objection by a continuance of the cause, or giving notice to produce the paper. It would be a surprise on the party to withhold the objection when the parol testimony was offered, and urge it on the hearing. We suppose that on this ground alone the objection must be overruled.

But there are other reasons. The delivery of the written agreement to the Bank, by its agent, Mr. Walker, was premature, as is shown by the further and successful opposition of the Bank to the attachment title. This, as has been shown, was within the agreement, and the removal of the title under the attachment was the condition on which the papers in the hands of Walker were to be delivered, fully executed. The papers, therefore, surrendered by Mr. Walker, to the Bank, through mistake, have been wrongfully withheld by the Bank. Under such circumstances it may well be doubted whether, if the objection to the parol proof had been made when it was offered, it could have been sustained.

The written agreement being in possession of the Bank or its agents, the contents must be presumed to be known to it, and, consequently, the parol proof can cause no surprise.

"The rule which requires that a party shall have previous notice to produce a written instrument in his possession, before the contents can be proved as evidence in the cause, has been made with good reason; in order that the party may not be taken by surprise, &c. But this reason will not apply to cases where, from the nature of the proceedings, the defendant has notice that the complainant means to charge him with the possession of the instrument." 4 Phil. Ev., 441. As against the statute of frauds the defendant could not but know the written agreement proved would be relied on. In this view, this agreement must be considered as the foundation of the action.

But this agreement has been substantially executed. A valid mortgage has been executed to the Bank on the Lena-

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wee farm to secure the debt due to it by Edward Bissell, and for some years the Bank has been in possession of the farm, enjoying its rents and profits. Here is a writing which explains the nature of the transaction. This security was received on the application of the Bank, on the condition that the relinquishment of the Ohio lands and the railroad stock should be made to the complainant by the Bank. This was the consideration on which the complainant relinquished to the Bank the Lenawee farm. For all the purposes of the debt, the Bank has received the farm, and shall it take refuge under the statute of frauds, and refuse to pay the consideration? This would make an application of the statute, in violation of its language and intention. It would, in fact, protect fraud. Can an individual purchase a farm, and secure the right to it, and then refuse to pay for it, because the contract is not in writing? The contract is executed. The consideration may be proved by parol. The assignment of the securities, in this case, is no more than the indorsement of the notes for the mortgaged money, which carries with it the mortgage as an incident, and the transfer of the stock is personal property.

In no point of view can the statute of frauds avail the Bank, as set up in defense.

The objection to Edward Bissell as an incompetent witness is the only point now to be considered. And it may be remarked that, however this may be decided, it can not affect the decision of the case. The material facts are sufficiently established by the testimony of the Cashier of the Bank and Mr. Walker.

Edward Bissell owes the Bank, and if the Lenawee farm shall be received by the Bank he will owe his brother. In this view he has no interest that would go to his competency. It is only a question whether he shall owe the one party or the other.

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If the Ohio securities should be retained by the Bank, and also the railroad stock, to satisfy any balance on the Bank debt, after the sale of the Lenawee farm, his debt to his brother would be increased, as the property named would not be applied in discharge of it. In this view, the decree in this case would increase or lessen the debt of the witness to the complainant. But at the same time it would lessen or increase in the same proportion, his balance due the Bank. In this respect there would be no preponderance of interest in the witness. Upon the whole, his testimony will not be excluded.

The equity of the complainant is sustained by the evidence, and he is entitled to a decree. It is therefore ordered and decreed, that the plaintiff shall execute a good and sufficient deed of general warranty to the Bank for the Lenawee farm, in payment of the debt secured by the mortgage dated 25th December, 1830; and that defendant pay the costs of this suit. It is further decreed that the defendant shall assign the mortgage on the Ohio property, dated 18th May, 1838, and the note secured thereby shall be delivered up to the plaintiff; also, that the twenty-two shares of stock in the Erie and Kalamazoo Railroad shall be transferred by the defendant to the plaintiff.

It is further ordered and decreed, that the complainant shall pay to the defendant, the amount of counsel fees and other costs in resisting the attachment and defending the action of ejectment, mentioned in the bill of complaint.

CIRCUIT COURT OF THE UNITED STATES.

ILLINOIS—JULY TERM, 1853.

JOHN H. KEMPER v. ADAMS & BAVEY.

The lien of a judgment is not a title to the land, against which the statute of limitations can operate.

It is a security, and not a claim of title.

The conveyance of the land, after the judgment, does not affect the lien.

Mr. *Logan* appeared for the plaintiff.

Mr. *Lincoln* for defendants.

OPINION OF THE COURT.

This is an action of ejectment, under a statute of Illinois. Possession by defendant was admitted. A patent dated 10th July, 1844, to Thomas A. Denny, was given in evidence, which covers the land in controversy. A deed from the patentee, dated 7th of July, 1843, to Bradshaw, was also in evidence. A judgment was obtained against Bradshaw, at the suit of Kemper, for four thousand three hundred and fifty dollars, the 14th of June, 1843. The court, in which the judgment

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was rendered, adjourned the 20th of June, from which day the lien of the judgment attached, by a statute of the State. Execution was issued the 1st July, 1843, which was returned no property. An alias execution was issued the 15th of February, 1848, which was levied on the lands in controversy. A venditioni exponas was issued the 28th August, 1848, and the lands were sold the 8th of June, 1850. The marshal's deed was made the 7th of January, 1851, under the order of the court, by the new marshal, to the plaintiff.

The defendant gave in evidence a deed from Bradshaw to Adams, for the land, dated the 10th of July, 1843; also a deed from Adams to Bavey, one of the defendants, dated 20th July, 1843.

On this defense the question is made as to the effect of the lien on the judgment. By the Revised Statute of Illinois, it is provided, that a judgment shall be a lien from the last day of the court, at which the judgment is entered, for the term of seven years.

The judgment was entered prior to the deed of the defendant, and before the deed from Bradshaw to Adams. The statute of limitations did not begin to run before the deed of the 10th of July, 1843. But the lien of the judgment is no title or claim on the land. It gives no right of possession. It is a mere security for the payment of the judgment, but is no claim to the land. The conveyance of the land, after the judgment, does not affect the lien. Until the marshal's deed was executed, there was no title in the plaintiff against which the statute could run.

The jury, under the instruction of the court, found for the plaintiff. Judgment.

UNITED STATES v. EDMUND KEENE.

It is an offense under the post office law of 1825, 45th section, to receive or buy any article that has been stolen from the mail, knowing it to have been so stolen.

To show that the article has been stolen, the conviction of the individuals who stole it, is sufficient, if the article be identified.

When an individual is found in possession of stolen property, and fails to show how he acquired it, or gives inconsistent or contradictory accounts, how he came by it, the presumption of guilt is strengthened.

Mr. *Horn* District Attorney.

Messrs. *Gregg & Edwards* for defendant.

CHARGE OF THE COURT.

Gentlemen of the Jury,—The defendant is indicted for receiving from Daniel Keene a certain article of value known as, and called a land warrant, of the value of thirty dollars, which warrant the said Daniel Keene had before then stolen from the mail of the United States, in said State and District of Illinois, on the route between the town of Fairfield, and the town of Carmi, to wit: On the 30th day of July, 1852; and which warrant the said Edmund Keene, at the time he so received it, knew it had been stolen; as aforesaid, by Daniel Keene, from the mail of the United States.

A second count that Daniel Keene, being a carrier of the mail, &c., opened a certain mail of letters, which came to his possession as carrier, in August, 1852, in the State of Illinois, and that the defendant aided, advised, and assisted in opening the same, &c.

The 21st sec. of the Post Office Act of 1825, provides, that if any carrier of the mail shall steal therefrom any letter or packet of letters, which he was required to carry by post, which shall contain a bank note or other article of value, on con-

viction shall be fined and punished by confinement to hard labor, &c.

The 45th sec. of the same act provides that, "if any person shall buy, receive, or conceal, or aid in buying, or concealing any article mentioned in the 21st section of this act, knowing the same to have been stolen or embezzled from the mail of the United States, or out of any post office, or if any person shall be accessary after the fact, to any robbery of the carrier of the mail of the United States, &c., every person so offending, shall, on conviction thereof, pay a fine not exceeding two thousand dollars, and be imprisoned and confined to hard labor for any time not exceeding ten years."

To authorize a conviction, it must be proved, that the land warrant in question was stolen from the mail by Daniel Keene, and that it was received by the defendant from him knowing it to have been so stolen.

To show the guilt of Daniel Keene, the record of his conviction has been read in evidence. In the indictment he was charged with stealing certain letters on the route from Fairfield to Carmi, in the District of Illinois, containing certain articles of value, known as land warrants, the 30th of July, 1853.

This only establishes the guilt of Daniel Keene, of the offense charged in the indictment. The charge was, "stealing a letter containing land warrants." No particular warrant is specified.

J. W. Barnwell, assistant post-master at Fairfield, swears that he mailed a letter at that office the 30th of July, 1852, directed to Mr. Wilson, of Shawneetown, in which were enclosed two land warrants, one for one hundred and sixty acres, No. 9,370. Daniel Keene was the carrier of the mail on the route from Fairfield to Carmi. It is proved by Mr. Wilson, to whom the letter was directed, that it was not received, and that the day it should have been received at

Shawneetown, no packet was received from Fairfield. It is proved by other witnesses, that the above warrant, shortly after it was mailed, was in possession of the defendant, Edmund Keene.

The defendant and Daniel Keene are brothers, the latter being a youth of some sixteen years of age. Some evidence was given to show that the brothers were seen together shortly after the letter was stolen from the mail. And the defendant, at the same time, professed that he had several land warrants to sell.

Is the defendant guilty of receiving this warrant, from Daniel Keene, his brother, knowing it to have been stolen from the mail?

That he was in possession of the warrant, clearly identified as having been stolen from the mail by his brother Daniel, is not denied. It is shown to have been the same warrant, which, with another warrant, was mailed at Fairfield the 30th day of July last year. This warrant could only have been taken out of the mail clandestinely by some one who had possession of the mail. The defendant was the elder brother of Daniel, who, it is proved, was young and inexperienced.

The account given by Edmund of the manner he procured this warrant, is alleged to be improbable, inconsistent and contradictory. To one person he said he paid two yoke of oxen for it; but afterwards said to the same individual, he gave for the warrant one hundred and twelve dollars in cash. That he procured this money from Joseph and William Curl, to whom he gave his note. That he borrowed from them one hundred or one hundred and fifty dollars. The warrant, he said, he purchased from Oliver Ward, of White county. Afterwards alleged he had bought it of his brother John Keene. Said he had seven or eight of them.

Where a party is found in possession of stolen property clearly identified, it is incumbent on him to show how he ac-

quired the property. This is no hardship, as an honest dealer must always be able to show, especially where the property is peculiar, of whom he obtained it. And if he fail to do this, the presumption of his guilt is greatly strengthened.

The ground assumed in the defense, that the place where the offense is alleged to have been committed, has not been proved, is entitled, it would seem, to but little consideration. It is alleged and proved that the letter containing the land warrant was mailed at Fairfield, directed to Mr. Wilson, of Shawneetown. Now, if you are able to say, from the proof, that this mail route was in the State of Illinois, it is sufficient to support the charge.

If you have reasonable doubts of the guilt of the accused, you will acquit the defendant; and if, on the contrary, you find in your minds no such doubts, you will find the defendant guilty.

The jury returned a verdict, that the defendant was guilty.

CIRCUIT COURT OF THE UNITED STATES.

OHIO—OCTOBER TERM, 1853.

THE UNITED STATES v. LYMAN COLE, ET AL.

[As this is an important case, it is published out of its order.]

The 23d sec. of the act of Congress of the 3d of March, 1825, which punishes a conspiracy to destroy a vessel or cargo, with the intent to defraud the underwriters is constitutional.

The object of the act is, to protect commerce, and the protection to underwriters is incidental.

The act applies to our internal as well as to our foreign commerce.

The mischief is as great in the one case as in the other.

And the opportunities to commit the offense, are much greater in our internal, than in our foreign commerce.

This Congress has as full power to do, for the protection of commerce among the several States, as for the protection of commerce with foreign nations.

After prima facie evidence has been given of a conspiracy, the statements of those implicated, though not included in the indictment, is evidence.

This is, on the principle, that where a combination of individuals has been formed, to commit an unlawful act, they have assumed an individuality in doing the wrong, and the conduct of each one in doing or promoting the act, is chargeable on the whole.

The burning of the vessel is not necessary to complete the offense.

Any combination of two or more persons to destroy the vessel or cargo, consummates the offense under the law, though neither the vessel nor the cargo is injured.

The act strikes at the incipient stages of the crime.

In its object it is preventive, by punishing the design to do the act.

The United States v. Lyman Cole et al.

Circumstantial evidence may be as satisfactory to a jury as positive. Sometimes it may equal positive proof.

The destruction of the vessel by the defendants, or by any one of them, identified with the defendants as conspirators, would be conclusive against them.

The burning of the vessel is not punishable under the act of Congress, but it operates as evidence, against the defendants.

The testimony to show the unlawful combination does not end at the destruction of the boat.

After, as well as before that event, the acts of the confederates may be examined to show their guilt.

Their entire acts, in relation to the subject matter of the indictment, which conduce to show a guilty purpose, may be proved.

The jury are the exclusive judges of the credibility of witnesses.

The manner in which a witness testified, the opportunity he had of knowing the facts he swears to, and his whole deportment in making his statements, will necessarily have an effect with the jury, in giving or withholding their confidence in his statements.

In coming to a conclusion of guilty or not guilty, the jury will weigh the evidence and exercise their best and most deliberate judgment.

They will not convict unless their minds are clearly convinced of the guilt of the accused.

But if so convinced, they will not be deterred from a conviction of the defendants, in whole or in part, as the evidence may require, from the consequences which may follow.

We have, in this trial, only to look at the facts and the law. With consequences we have nothing to do.

But if the jury are not satisfied of the guilt of the defendants, beyond reasonable doubts, an acquittal should follow.

Mr. Stanbery, *Mr. Morton* District Attorney of the United States, and *Mr. Ware* appeared for the government

Messrs. Ewing, Walker, Swayne, Pendleton, and Ward, appeared for the defendants.

OPINION OF THE COURT.

Before the jury were called, a motion was made by the defendants' counsel to quash the indictment.

The main ground upon which the motion to quash was urged was, that the act under which the indictment was found, applied, exclusively to offenses committed on the

high seas, and not on our rivers and lakes. It was also urged that the act was unconstitutional, if it was intended to apply to our internal commerce. These points were argued elaborately, on both sides, and with ability.

In deciding the motion, Judge McLean said, that the court would proceed to give its impression upon the case, which had been so ably argued. The law under which the prosecution was commenced, is embodied in the 22d sec. of the act of the 3d of March, 1825. It provides, "that if any person or persons shall, on the high seas, or within the United States, willfully and corruptly conspire, combine and confederate, with any other person or persons, such other person or persons being either within or without the United States, to cast away, burn, or otherwise destroy, any ship or vessel, or procure the same to be done, with intent to injure any person or body politic, that hath underwritten, or shall thereafterwards underwrite, any policy of insurance thereon, or on goods on board thereof, or with intent to injure any person or body politic, that hath lent or advanced, or thereafter shall lend or advance any money on such vessel, on bottomry or respondentia," &c.

The first position of the counsel who concluded the argument on the motion was, that the act was unconstitutional and void. He contends that the object of the law was, to protect insurance companies, and that Congress has no power to pass such an act.

This act does not purport to be for the protection and regulation of insurance offices. It is clear that Congress can exercise no power over contracts of insurance. It has been decided that when a policy of insurance was on a ship on a sea voyage, as the policy operated upon the water, and not on the land, that it was a marine contract. This is contrary to the English doctrine, as it requires the contract to be made on the water to give it the character of a marine contract. The courts of common law, in England, have been

strongly opposed to the admiralty jurisdiction. And the rule is well settled there, that it cannot be exercised within the body of a county. It can be exercised over no water where the tide does not ebb and flow. The Supreme Court of the United States have adopted a more reasonable doctrine, long established by the civil law, that a maritime jurisdiction may be exercised over navigable waters. Navigableness is the true test, and not the flowing of the tides.

It is known that in England there are few if any rivers navigable higher than the flowing of the tide, and this is generally the case with the rivers in the Atlantic States. This, was, no doubt, the cause why the English rule was first followed by our courts in this country. There seemed to be no good reason why the same rule should not be applied in both countries, as the navigable waters of both were made navigable by the tide. It was a convenient term, at first used to describe the extent of navigable waters in England. We have adopted the fact rather than the definition of it. Wherever commercial crafts may float between two or more States, the maritime jurisdiction extends.

But independently of this view, under the constitution, Congress has the same power to regulate commerce among the several States, as with foreign nations. As regards the present case, no distinction need be stated, if any exist, between the regulation of our foreign and domestic commerce.

Is the scope of the act in question to protect policies of insurance? What is clearly the object of the law? The conspiracy charged is against a vessel and her cargo, upon a river under the protection of the commercial power of the Union. The protection of commerce is the object of this law; the protection of insurance policies is merely incidental. Congress might have punished the burning of the vessel, but it was not thought proper to do so; it has leveled its enactment at the incipient stages of the offense. The law in its object is preventive; by inflicting the penalty on the determination to

commit the crime. It does not go behind the overt act to the motive, as the laws of Omniscience ; but it strikes at the first manifestation of the intent.

Whether the conspiracy is formed on the high seas, or within the United States, is of no importance. The offense is so far consummated as to come within the act when the conspiracy is formed. It was wise to strike at the first step, as it gives time for reflection and repentance.

The words of the section apply as forcibly to vessels on our rivers and lakes, as on the high seas. The mischief is as great in the one case as in the other. But the opportunities and motives to commit the offense against our internal commerce are much greater than against our foreign commerce. Under such circumstances can any court hesitate to consider the law according to the express language used, as punishing the offense, whether committed on our internal or foreign commerce.

The invoices are alleged in the indictment to have been false, and if they were really so, it is argued there could be no conviction, as the conspiracy charged is to destroy the cargo.

Can the defendants claim an exemption from the penalty of the statute, by committing a double fraud ? A fraud in having false bills of lading, and another fraud in conspiring to destroy the cargo. False invoices or bills of lading would establish the fraud charged. If a party is not liable under the act of Congress when the shipment is fictitious, he would be protected from punishment by his own fraud. This is inadmissible in any code of morals, and especially is it against the law.

We have not time to read the indictment through, but our impression is, on hearing it read, that it is sufficient. The defendants can avail themselves of any fatal defect in the indictment at a future stage of the proceeding. The motion to quash the indictment is overruled.

The jurors being called, Messrs. Morton and Stanbery, on the part of the Government, demanded the exercise of their peremptory challenge after the defendants had challenged.

Judge Walker had never heard of the violation of the rule that the Government should challenge first, and then the defendants exercise their right, except in two instances.

The court decided that the challenge should be exercised alternately.

Counsel for the Government had no objection to the jury if the defendants had not. They waived the first challenge.

Judge Walker proposed to propound the following question to each of the jurors :

“ Have you, by conversation with others, or by the reading of newspapers, acquired such a bias as will prevent you returning an impartial verdict according to the law and the evidence ?”

The court allowed the question to be put.

Mr. Van Slyke answered that he had formed an opinion, unfavorable to the defendants ; and for that he was excused for cause. The other eleven replied in the negative.

Judge Walker challenged a juror peremptorily. Dr. Møller was called to fill the vacancy, and begged to be excused because he had formed an acquaintance with Kissane, as physician to the jail. Further discussion took place between counsel. Juror was interrogated by the court. He replied that his sympathies had been somewhat excited for Kissane—had had conversations with him with respect to this case on one or two occasions. Had not such a bias as would prevent his returning an impartial verdict. Had patients that needed his attendance.

The court excused Dr. Møller.

Mr. Slocum was called to fill the vacancy.

Judge Walker put the question he had before propounded to the other jurors, to Mr. Slocum.

The juror had no bias.

Judge Walker challenged another juror peremptorily.

A. J. Clark was called. Question put by Judge Walker, and answered in the negative.

Judge Walker asked the defendants whether they desired he should make any further challenge.

Mr. Stanbery now claimed to exercise the right to peremptory challenge for the Government.

After consultation between the judges the court allowed it.

A. J. Clark was challenged by Mr. Stanbery.

Judge Walker challenged the juror who was called in Mr. Clark's place.

Benj. Tresenrider was called to fill the vacancy. Question put and answered in the negative.

Mr. Slocum was challenged for the defendants.

John R. L. Seegur was called. Question as to bias put and answered in the negative.

Dr. Toland was challenged by counsel for defendants.

James L. Faran was called. Question put as to bias by Judge Walker.

Juror.—Know nothing about the case—would rather be excused from serving—just stepped into the court five minutes ago to see who Judge McLean was. Had no idea of being called as a juror.

Mr. Miner was challenged for the defendants.

Henry Wellhamer was called, and came in crying—I wish to be excused, judge.

Judge McLean.—Very likely—but for what reason?

Juror.—I have just set out on a journey.

Mr. Wellhamer was excused for that reason by the court.

Mr. Taylor called. Question put as to bias—answered in the affirmative, and was therefore excused.

William Blynn called. Question put as to bias—answered in the negative.

Another juror challenged by Judge Walker.

Geo. W. Slocum called. Question put—answered “no.”

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Another juror was challenged.

A. McCrea was called. Question put—answered : he had read the preliminary trial and formed an opinion. Excused.

A. Tyler called. Question put—answered in the negative.

Mr. Tyler was challenged.

There being no prospect of completing the panel the court adjourned.

FRIDAY, OCTOBER 21, 1853.

The calling of jurors to complete the panel was proceeded with. Some jurors were excused on the plea of sickness or inability to endure the confinement attendant on the trial.

The jury, as finally constituted, stood as follows : Joseph Newell, Levi J. Haughey, Wm. L. Brown, E. B. Sacket, Jas. L. Farren, Geo. W. Slocum, Wm. Aston, S. V. Martin, John Miller, F. C. Sessions, C. W. Kent, Henry Miller.

Mr. Morton, District Attorney, opened the case for the United States, as follows :

The Grand Jury of the United States, for the District of Ohio, at the last April term of this court, returned as a true bill, a bill of indictment against Lyman Cole, William Kisanee, John N. Cummings, George P. Stephens, William H. Holland, Benjamin W. Kimball, James W. Chandler, James G. Nicholson, Adams Chapin, Amasa Chapin, Rufus Chapin and Lorenzo Chapin, charging them and one Lucius L. Filley, deceased, with entering into a combination and conspiracy to burn the steamer Martha Washington, and with afterward setting on fire and burning said boat.

The time and place of the conspiracy is laid as of the fifteenth day of December, A. D. 1851, at Cincinnati, in the district of Ohio. The burning of the boat is alleged to have taken place on the fourteenth day of January, A. D. 1852, near Island Sixty-five, in the Mississippi river, about sixty miles below Memphis.

The object of the conspiracy was to injure and defraud underwriters who should thereafter underwrite policies of insurance upon the hull and cargo of said steamer.

The first count charges the conspiracy in general terms in the language of the statute, without specifying any overt act. The remaining seven counts charge the offense in the same manner, together with divers overt acts, done and performed by some or all of the defendants in furtherance of the common design. All of the remaining counts particularly set forth and describe policies of insurance, which were obtained by the defendants, and the sixth count alleges that divers other policies of insurance were procured by the defendants from underwriters to the Grand Jury unknown.

Nine only of the defendants are now on trial. James G. Nicholson, the clerk of the boat, was arrested before the finding of the indictment, and was discharged on bail: He did not appear, and his bail bond was forfeited at the last term of this court, and he is still at large, as also are Stephens and Chandler. Although the most diligent search has been made for them, they have not been found. The others (save Filley, who died before the indictment was found) are now on trial.

To this indictment the defendants have plead not guilty, and you are now impaneled to try the issue between them and the government.

It is the duty of the government to preserve the peace and good order of society, and for this purpose laws are enacted defining those acts which constitute a crime, and fixing a penalty for its perpetration. When a person is legally accused of a crime or misdemeanor he must be tried, and if found guilty, must suffer the penalty of the law. The welfare of the community, the very existence of civilized society depends upon the due administration of law.

But it is also a high and sacred duty of the government to protect the innocent and unoffending in the enjoyment of

their rights, and when a man is accused in the courts of justice, it is incumbent upon the officers of the law to afford him every possible means of establishing his innocence, and to prevent any unfairness to be practiced in procuring his conviction.

The high character of the judges who compose this court, and the distinguished ability and learning of the professional gentlemen who appear on behalf of the defendants, and (if I may be permitted to allude to it without giving offense) the number of counsel employed, is a sufficient guaranty that they will have a fair and impartial trial, and if innocent will certainly be acquitted. You, gentlemen of the jury, are too well informed of your duty as jurors and the obligation of the oath you have just taken to permit any thing but the truth as it shall be given you in evidence, to affect your judgment or influence your verdict. You will direct your attention to the law and the testimony, and carefully exclude from your consideration every statement or rumor which you may have heard or read, calculated to prejudice these defendants.

You have already discovered that this investigation is to be a protracted and laborious one, and will call for the exercise of all the patience and candor of which you are possessed.

That such an accusation as is contained in this indictment should be allowed to pass without legal investigation, or that after conviction the offender should escape the severest penalties of the law, would be an everlasting stigma upon our institutions of government. A distinguished lawyer and statesman of Ireland, speaking of the administration of law in the courts of England, said that with a coach and six any man could drive through an act of Parliament. For the honor of my country I hope the time may never come when this may ever be truly said of the courts of the United States. Of the courts of Republican America let it ever be said that here the stream of justice flows ever pure and uninfluenced

by affection, unintimidated by power, and undefiled by corruption.

Let us inquire now for the law upon which this indictment is founded. What is the mischief designed to be prevented by it? It is to prevent combinations and conspiracies to burn any ship or vessel with intent to defraud any underwriters. Three things must exist to constitute the offense—the confederation or agreement of two or more persons, to burn a ship or vessel, for the purpose of defrauding underwriters. If the conspiracy be proved and the intent be established, viz : to defraud underwriters, yet if it be to burn a house it would not sustain this indictment. The fraud which this law is intended to prevent is that alone which can be effected by the burning of a ship. We can clearly see then that it was that great department of the business of the country which is carried on by means of ships or vessels, that is intended to be protected by this act.

Several important inquiries arise upon the law of this statute, but this is not the proper stage of the investigation for their examination. It is sufficient to say, *ita lex scripta est*. Thus the law is written. We must observe the law without enquiring into the reasons of it. But the necessity of this law is obvious.

We are a commercial people, made so by our vast industrial and agricultural resources. Our rivers furnish exhaustless supplies of power for propelling machinery as well as do our mountains of coal and great forests. The mineral wealth of the country needs not to be transported a great distance to be manufactured, for here both the raw material and the motive power are found in the same region of country. But of what use are manufactories without a market? and there is no market without commerce. Our own wants are already supplied in every species of product of our own industry. We must exchange our own for those of other nations or we derive no profit from our labor.

Consider next the agricultural wealth of this country. Here is the granary of the world, the Egypt of modern times. Here lie the rich valleys, the fertile hills, the broad plains and illimitable prairies of the Great West, all teeming with the luxurious products of the soil. But what of all these, and of what value are they to us if we have not commerce? Our richest treasures turn to ashes in our hands if we can not carry them to the people who inhabit less favored regions of the earth. But we have the means ample and sufficient for all these wants. We have steamers, we have sail vessels, we have the stately ship and the humble navigator of the creek and canal. Every river and lake, every pond and basin from Newfoundland to Mexico, from the Alleghenies to the Rocky Mountains, is agitated and kept in motion by these vehicles of commerce. Byron said, in describing the movements of a ship, "she walks the water like a thing of life." I would improve the simile by saying that these instruments of commerce make the very waters instinct with life and action.

The amount and value of property daily floating upon our navigable waters is vast almost beyond the reach of calculation. To those not engaged in commercial pursuits, and not accustomed to study commercial statistics, a statement approximating any where near the truth would be considered exaggerated and wildly extravagant. But commerce is a hazardous pursuit, peculiarly so. Out of the necessities of this immense commerce associations of underwriters or insurance companies have sprung up all over the country. Some have been fortunate and successful; others have been overwhelmed by losses, and those engaged in them brought from affluence to poverty. Their office is to protect commerce by assuming its hazards and risks.

The influence of these associations of underwriters has been in the highest degree salutary to the commercial interests of the country. When the merchant or the producer embarks his entire fortune upon a frail ship for a distant

market, these associations are ready to assume all the hazards of the voyage, and to guaranty its safe arrival at the port of destination, for a small proportion or per centage of its entire value. In case of a loss, the calamity, instead of falling with crushing weight upon the owner, and consigning himself and family to beggary, is distributed upon a great number, who, by a contribution of small proportions, are enabled to restore to the owner the entire value of his property, generally without serious damage to any one. Thus the loss is assessed upon the whole commercial community—a worthy and enterprising member of it is saved from ruin, and his business it continued without interruption. Thus, by means of the principle of insurance, a pursuit in itself the most hazardous, is rendered entirely safe, and greatly facilitated and encouraged.

The protection and fostering care of the government has been extended to these associations, whose prosperity has justly been considered a matter of great national concern. The people in the formation of the constitution of these United States took care to remove this subject beyond the reach of the cupidity and selfishness of individual States, and entrusted it to the keeping of the national government. Hence the passage of the law by Congress upon which this indictment is founded. The court has decided that Congress has power to pass this law; if it could not elsewhere be found in the constitution, it seems to me it might properly be referred to the general grant of power to pass all laws necessary to the exercise of the power expressly granted. But this is not the time to discuss, nor is a jury the proper tribunal to pass upon that question.

The voluminous nature of the testimony, the multiplicity of the facts involved, render it impossible that I should at this time communicate to you a particular and detailed statement of the proofs which will be adduced on the part of the government in support of the indictment. I shall content

myself with merely pointing out to you under general heads, the nature and kind of proof which will be adduced in testimony before you.

I. The relations of the defendants to one another will be shown. It will appear that a part of them were on the river Rio Grande, during the Mexican war, not as soldiers, but as followers of the camp, in pursuit of private gain. That they were intimately associated and closely connected together, while in that country. Those who were thus engaged on the Rio Grande, are Cole, Cummings, Holland, Stephens, Chandler, Nicholson, and two of the brothers Chapin.

After the close of the war, they are found congregated at Cincinnati. Subsequently Kissane, and the two other brothers Chapin, and Filley, a partner of the Chapins, are admitted to their fraternity, and often seen in their company at divers places in and about Cincinnati, at unusual hours, and with no apparent business. They were often engaged in private consultation, the object of which was concealed from all but themselves. Save Filley and the Chapins and Kissane, none of them were engaged in any ostensible business, and some of them were strangers, sojourning only temporarily at Cincinnati. These interviews and consultations took place frequently before, and for some time after, the burning of the boat.

II. It will appear that the defendants, in December, 1851, concocted the purchase of the steamer Martha Washington, an old and dilapidated boat, and caused her papers to be made out in the name of Lewis Choate, who was in no way interested in the purchase. The reasons for this purchase, and for the adoption of the name of a fictitious owner, it will be important for you to ascertain. For the prosecution it will be contended that this was the scheme of fraud intended to be perpetrated upon the insurance companies.

III. In order to procure policies of insurance and advances from consignees, the defendants pretended to ship large

quantities of merchandise on board said steamer, and procured from the Captain and Clerk of the boat (who are charged as conspirators in this indictment) *false bills of lading* by means of which they succeeded in obtaining policies of insurance and advances to a very large amount. Most of these were effected upon the sixth and seventh days of January, and from that time up to the 12th of January, 1852, in the short space of six days and at numerous places in parts of the country remote from each other.

IV. The boat left Cincinnati on the night of the 7th of January, 1852. While on her way down the river, goods were put off at different ports which were marked as consigned to New Orleans and more distant ports. The boat was burned near Island sixty-five, about sixty miles below Memphis, on the Mississippi river, at half-past one o'clock on the morning of the 14th of January, 1852. The Captain, Mate, and Clerk of the boat were all up, neither having yet retired to their berths, and neither of them were on duty at the time.

V. After the burning of the boat the defendants entered upon a concerted course of action to render each other mutual aid in effecting the payment of the policies thus obtained, by means of false papers and false oaths.

The Insurance Companies demanded proofs of quantities and values of the goods on board at the time of the burning. These defendants made false invoices to one another in order to consummate the fraud on the companies, and added the crime of perjury to that of conspiracy, arson and murder.

Consignments of inferior articles of trifling cost, described as being articles of a superior kind and great cost, will be shown to have been made by these defendants upon this boat.

Some of the defendants failing to produce original bills of purchase, pretended that the same had been destroyed as papers possessing no value.

It will be shown that the amounts of property pretended to have been shipped by these defendants are incredible, considering their limited means and credit.

The quantities of particular kinds of goods are incredible for any one house or person to be possessed of at that time in the year and state of the market with reference to supply and demand.

They were pretended to be shipped from Cincinnati to New York, when they were actually worth and would command a higher price, if they had them to sell, in Cincinnati than in New York, and the goods were of a kind to meet a ready sale for cash, as there was a scarcity in the Cincinnati market. The goods I now refer to are hides and leather, of which it is claimed immense quantities were shipped by some of these defendants on board of this ill-fated boat.

We shall offer proof to show that if the goods which these defendants procured to be insured had been on board, she could not have floated them and the goods actually shipped by other persons.

It will appear that there were goods on board of this boat which were lost but they were not the goods of these defendants and upon which these insurances were effected.

VI. Having thus proved to you that the defendants are guilty of this unlawful combination and conspiracy by the testimony to which I have alluded, we shall then produce the confession of Lucius L. Filley, one of the conspirators, now deceased, made in his life time, in which he gives the details of this horrible crime, and fully discloses all the parties engaged, and the part which each performed in the *tragedy*, which resulted in the destruction of a large amount of property, and the lives of sixteen at least, innocent, unoffending human beings.

Thus, gentlemen, I have briefly stated the kind of evidence relied upon by the government for a conviction in this case. By keeping these general divisions in view, I believe you will

be enabled to perceive the application of all the testimony which will be submitted on the part of the prosecution.

After a large number of the witnesses in favor of the prosecution had been called and sworn, the counsel for the defendants observed to the court, from the nature of the prosecution, and the circumstances attending it, they deemed it important to have the witnesses separated, so that they should not hear the statements of the one under examination. This was not objected to by the counsel for the prosecution; and it being a motion often made, rarely objected to, and never denied in a criminal case, the court entered the order.

The witnesses for the prosecution were then called and examined in the following order :

Robert McGrew, sen.—Stated that he lived in Cincinnati in 1851, on 7th street, between Main and Walnut. He knew Holland, Kissane, Cole, Nicholson, and Stephenson. In October or the beginning of November of that year, Stephenson and Edwards came to his house to board. Holland came next; was brought to his house by Stephens. Young Cole was introduced by Holland. Cole and Kissane came to see Holland. Cummings was brought to his house to dine by Holland. Capt. Cummings and Kissane were often there. Never saw Cole, the defendant, there but once. Saw Holland at Kissane's pork house. Holland said he became acquainted with Cole and the Chapins in Mexico, on the Rio Grande.

Holland, Edwards, and Stephens, with Cole, and some others, were engaged in running a steamboat on the Rio Grande.

It was here objected that the statement of Edwards, who is not a party on the record, could not be received as evidence against the other defendants. The court stated that the conspiracy must be proved, before the statements of those

who were engaged in it, but were not indicted, could be received as evidence against the defendants. But as the prosecution proposed to prove the combination, the court would, for the present, hear the witness.

In a few days after the above, the witness states that Edwards and Stephens left the house of witness, as they said, for New Orleans. Edwards said he was going in January on the Martha Washington, to take command of a boat on Red river. Holland returned after the burning of the Martha Washington. Sometime afterward Stephens returned. Stephens first came to the house of witness, and afterwards, brought Holland to the house. Stephens remained three or four weeks. Holland remained longer. Saw Nicholson once when he called to see Holland. He appeared to have no business. Stephens said he came to receive the insurance for the goods lost on the Martha Washington. Heard Kissane say that he had never known Holland or Stephens, until he saw them at the house of witness.

On cross-examination, witness says, that when Kissane called at his house, he saw the persons above named in the public room. He talked about having some tanks, and requested Stephens to call and see the tanks. At the time Holland was at the house of witness, the river was frozen over.

William Northup—Witness lived in Cincinnati in 1851. His place of business was corner of Court and Walnut. In 1842 the witness lived on Fourth street. In the winter of 1851, before Christmas, saw Kissane call frequently on Cummings.

Robert McGrew, jr.—States substantially, facts, as related by his father.

Mr. Walker, one of the counsel for defendants, made the objection again that no confessions of a party, not in the indictment, should be received to inculcate the defendants, until the conspiracy shall be established. 2 Starkie on Ev.

was cited, 327 ; 2 Russel on Cr. 700, and Roscoe's Ev. 417, were read to show that the declaration of a stranger to the record could not be received as evidence.

The court stated it was a matter of practice in such a case, whether the court would hear the confessions of persons not on the record, to implicate the defendants, when an assurance was given by the prosecution that they would connect the person with the conspiracy. But the court observed, that the better and safer rule was, not to hear such confessions, before prima facie evidence was given to connect the witness with the conspiracy. 3 Greenleaf Ev. 58 ; 34 Com. L. 400 ; 2 Russel on Cr. 677.

The witness, McGrew, further stated, that Stephens paid his father for the board of Edwards, and also furnished Edwards with some clothing. Edwards had no boxes of merchandise at his father's. Holland, when he returned, had but little property, after the boat was burnt—a carpet bag was all.

Mr. *Penniman*—Witness lives in Terre Haute. In 1851-2, lived in Maysville, Kentucky. He was acquainted with several of the defendants. The winter before witness was acquainted with Nicholson at the City Hotel in Cincinnati. Nicholson spoke to witness at Maysville ; said he was on his way to see his wife at the Esculapian Springs, in Kentucky, before the Martha Washington sailed. Said he had purchased that boat.

Witness boarded at the Walnut Street House, in the spring of 1852, and saw Kissane, Nicholson, and Cummings walking on the street. Also he saw Nicholson and Cummings at Kissane's place of business. Had some conversation with Capt. Cummings, who said the boat took fire on the larboard side.

Mr. *McGregor*—Was one of the owners of the boat Martha Washington. Saw an advertisement saying some persons were desirous of buying a steamboat ; addressed a let-

ter to Mr. ———, as directed, and received in reply a letter from Capt. Cummings. Witness told him that he owned one half of the boat. Sold both halves eventually for nine thousand dollars; asked at first ten thousand. Capt. Cummings had only three thousand dollars. Finally, Capt. Cummings was to pay on the return trip, nine thousand dollars. On his return he paid six thousand dollars. Capt. Cummings said he had left his money, two thousand dollars, with Kissane. Kissane promised to pay the two thousand dollars, and promised to loan Capt. Cummings one thousand dollars. Kissane offered a draft by Cole, on Boston, which witness did not take.

Witness loaned seven hundred dollars to Capt. Cummings, and paid for him a bill, for stores, bought of Cassilly, for three hundred dollars. When the purchase of the boat was first made, Capt. Cummings said he had bills maturing for ten thousand dollars. The boat was four and a half years old; carried six hundred and forty tons. Witness shipped on board the boat the fourth or fifth of January, 24 hogsheads of bacon; 87 barrels of whiskey; 123 barrels of pork, and other freight. Witness recommended Kissane to ship on board the Martha Washington, who said he would if he could. Afterwards Kissane told him the Capt. had refused to take any more freight, and that he had shipped on another boat fifty hogsheads.

Capt. Pierce—Was on the levee when the cargo was being put on board the Martha Washington. Saw her at sun-set the day she left; appeared to be about half loaded. The vessel measured by enrolment 290 tons, but she actually measured more than that. He thinks she had not more than 350 tons on board. Does not recollect whether any persons, at the time he saw the boat, were engaged in loading her. A boat loaded in the stern would elevate the prow of the boat. He thinks the boat was worth seven thousand

dollars. Nosing of the boat is that which is a prominence on a level with the lower deck.

Lowel Fletcher—Shipped on board the boat 104 barrels of whiskey, amounting to about 15 tons. Saw a great deal of freight on the landing about 3 o'clock of the day the boat left.

Franklin Calliday—Was at Cincinnati, January, 1852. Went to Louisville; the Martha Washington was then there, the 8th of January; left Cincinnati the 7th. Witness went on board the Martha Washington, at Louisville. Saw Capt. Northup in the cabin. Capt. Cummings said he did not go on as a fog was rising on the falls. The boat was not fully loaded. Cummings said he waited for insurance—that he had about two-thirds of a load.

Lewis Clawson—Witness in 1852 lived in Cincinnati, was Secretary of an Insurance company. On the 9th of January, 1852, insured \$8,000 worth of merchandise on board the Martha Washington. Did not describe the kind of merchandise. The papers being called for: 1st. Bought of Lyman Cole articles amounting to \$6,359 50. 2d bill—bought of Smith & Kissane \$248 80. Bought of ———, 13 casks of brandy, &c., \$708 80. The bill of lading was in the handwriting of Kissane & Smith, beef and pork packers, manufacturers of candles, also of lard oil. The color of the ink of the signature of the bill of lading, was different when he first saw it from what it now is.

An open policy—thirty-three insurances—all except the above, of business in which the insured were engaged.

Mr. Carter—Lived in Cincinnati in 1852. Was agent for Firemans' Insurance Company,—also the Etna of Hartford. Mr. Stephens insured six boxes of merchandise, \$5,361. Witness took the insurance. After the loss of the boat, Stephens called; witness told him he must produce the invoices and bill of lading. Copies were afterwards furnished, but not the originals, purporting to be of goods purchased from

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John Edwards, \$5,361. The bill of lading was signed by Capt. Cummings. Witness inquired of Stephens when Edwards had gone South. Stephens referred him to Kissane and Capt Cummings. Kissane said he had known Stephens a good while, and that he was an honest man, and all right. Capt. Cummings said about the same thing. Witness did not pay the amount of insurance.

Cole issued an attachment, and summoned the company as garnishee. It has expended money in procuring testimony, &c. Burton was employed, witness understood, to attend to the business.

On the cross-examination, the witness said he believed several Insurance companies agreed to pay something to look up evidence. The company in which witness was engaged, paid \$500. If the same amount were paid by all the companies, would make the sum of \$3,000. Josiah Lawrence, President of the company, was rather opposed to this arrangement. Did not think that Kissane could have committed the fraud.

Mr. Love—Shipped on board the Martha Washington merchandise to the amount of 9½ tons.

William Emerson—Shipped 100 barrels of pork, making 15 tons.

Mr. Leahmer—On 200 barrels of lard oil, amounting to 30 tons, advanced \$4,709 65. It was destined to Philadelphia. Lard manufactured by Smith & Kissane, January, 1852, \$4,400. On candles, &c., witness also advanced. Charged five per cent. for advances. The bill of lading was signed by Nicholson.

Mr. Mack—Was agent for the Insurance office of Hartford, and made insurance for merchandise on board the Martha Washington for Stephens, 76 cases of boots, shoes, and hats, \$3,369 50. Stephens said he bought the goods from Lyman Cole. Had invoices which witness said were unnecessary.

After the *Martha Washington* was burnt, Stephens called to know what papers were necessary to claim the insurance. He had certified copies of the invoice and bill of lading. The originals were required, and they were afterward produced.

Invoice of goods shipped, amount \$3,372 75, 7th Jan'y, 1852. Stephens referred to Cole, and he spoke well of him.

Zenas Knowlton—Lives in Hamilton county. Knows Lyman Cole. Keeps a tavern. Saw Cole and Cummings at his house in 1851; thinks it was in the fall; might have been in 1850. Has seen Capt. Cummings on the road to Oxford. Saw a good many people travel on the same road.

John Shultz—In January, 1852, lived in Cincinnati. Shipped on board the *Martha Washington* 203 barrels of flour. Went on board the boat on the evening of the 7th January, 1852. The guards of the boat were two feet out of water. Passengers were at supper. Saw but very little freight on the shore. 25 or 30 boxes were on deck, near the social hall. Does not recollect whether there was a wharf boat or not, near the *Martha Washington*.

Samuel W. Smith—Witness is of the firm of Smith & Co. They shipped on board the *Martha Washington* 100 barrels of whiskey.

John S. Brown—Lived at Cincinnati in 1852. He shipped on the *Martha Washington* 56 barrels of lard oil; 25 boxes of cheese; 2 hogsheads of bacon sides, amounting to 3 tons. Witness saw Chandler; requested National Insurance; 4 boxes of revolving pistols, &c.

Mr. Ray—Shipped 264 barrels of red oil, and from 370 to 80 barrels of oil, not red.

Mr. Page—Lived in 1852 at Evansville, Indiana. The *Martha Washington*, in descending the river, landed at his wharf, and the following articles of freight were put on board

of her there : 37 bbls. of lard ; 25 bbls. of turnips ; one hundred pounds to a barrel ; 942 sacks of corn ; 140 bbls. of , 2½ bushels in each ; 332 sacks of corn. Bills of lading signed by Nicholson as clerk. Names on two bills of lading, Smith and Kissane erased, and Nicholson's name inserted.

Samuel P. Hibbart—Witness is a steamboat agent. Engaged freight for the Martha Washington. In 1852 lived in Washington. Capt. Cummings told him not to engage any more freight, as he had engaged a large amount. Witness engaged 525 tons, one hundred barrels not shipped. It is usual for captains to engage freight. Kissane said he had shipped 600 boxes of candles ; 600 boxes to another person.

Mr. Morse—Lives in Cincinnati. Was Secretary for National Insurance Company. Was applied to for James W. Chandler. Insured \$2,200 worth of merchandise on the Martha Washington. At the time of application no invoice was presented. But when payment was claimed after the loss of the Martha Washington, certain papers were in the hands of Chandler, who was arraigned before the commissioner, but discharged by him. Since that time he has absconded. He proposed to prove copies of the papers he took with him, which was admitted.

Chandler said he bought these goods from Crane, living on Fifth street, as a boarder ; no such man is known to have lived there.

Objection being made by defendants' counsel, the court held that before a person, not a party on the record, can by confession charge the defendants, he must be shown, by prima facie evidence, to have participated in the conspiracy.

On the cross-examination of Morse, he said that Chandler did not speak of Crane as a fixed resident in Cincinnati. Mr. Raul came with Chandler to the office. Raul is a respectable merchant. Chandler brought Southgate afterward,

who gave an affidavit that he saw the boxes that were shipped by Chandler. The witness states that the fund of five hundred dollars paid by his company, was not contributed to aid in a criminal prosecution.

Mr. York—Identified a document.

Mr. Brown—In January, 1852, lived in Covington. Stated no fact of importance.

Mr. Duval—In January, 1852, witness lived in Memphis. The 13th of January, the Martha Washington landed at Memphis, and put off there 15 barrels of lard oil, and 40 boxes of candles. Nicholson, the clerk, left them in care of witness, until he should call for them. The boat was burnt sixty odd miles below that place. After the boat was burnt, Nicholson called for the articles, and sold them to witness for \$636 70. Paid cash \$90, and a note for the balance, which was cashed by a broker in the town.

Doct. L'Hommedieu—In 1852 witness resided in Cincinnati. Went to the Walnut Street House in 1851; Cole was boarding there, and Nicholson was there. Kissane was there with them frequently. Witness says Kissane came to see them. Was not personally acquainted with Cole. Cole and Nicholson were said to be sporting men, and his attention was attracted by Kissane, a business man, being with them.

Charles Flournagler—Lives in Kentucky—deals in boots and shoes. Witness was at Cincinnati in the winter of 1851. He bought of Chapin's, red sole leather, 17th Nov., 1851, 150 boxes of boots. He purchased between fifty and a hundred sides of sole leather. He bought no kip boots; wanted two or three cases of them.

Mr. Murphy—Lives in Meigs county, Ohio. Was at Chapin's store, 1st Nov. 1851. Called to examine their stocks; he wanted different kinds of articles. They had some red sole leather; their stock was not large. Witness purchased shoes of others.

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Mr. Ward—Proves a bill of lading. Between the 1st and 5th of January, 1852, Mr. Dupler called to purchase 10 casks of brandy, and afterwards he bought five more. The first he paid 65 cents per gallon ; for the last, 25 cents. Two of the casks of brandy were returned ; could not be received on the Martha Washington. Kissane paid for 13 casks \$578 90, in soap and candles. The bills for the candles were in Kissane's handwriting. The brandy was directed to be sent to the Martha Washington. Two casks were returned by the drayman, who said that the boat would receive no more freight.

Mr. Casselly—In 1852, the Mechanics' Fireman Insurance Company, at Madison, insured an invoice of goods bought of Lyman Cole, on 1st January, 1852, for 13 barrels of brandy, \$1,792 25. After the boat was burnt application was made at the office for payment, and the amount was paid.

On the cross-examination witness says he does not know of any arrangement with the insurance offices in Cincinnati, to pay Burton any money.

Being again examined in chief, the witness said; a short time after the insurance was paid, he felt suspicious that something was wrong. Lawrence was then alive. Company had a meeting, agreed to pay persons to investigate the matter. Mr. Ross and Mr. Scarborough were employed.

James Chew—In January, 1852, witness was agent for the Utica Insurance Company. Nicholson insured on his for five hundred dollars, and six hundred dollars on two boxes of merchandise. Mr. Laws, who insured for Nicholson, said the boxes contained ladies' cloaks.

Mr. Cranis—Witness in 1852 lived in Cincinnati, and carried on the leather business. He was a creditor of Chapins. He held their notes for \$832. He was through their establishment about the time they sold to Cole. White sole leather is tanned with chesnut-oak bark, and it is better than red sole leather. There was a good demand for white sole

leather in 1851-2. Did not know of two hundred rolls of sole leather in the city unless Taylor had them. When he went through the establishment of Chapins, did not see any white sole leather. He saw about 20 dozen of sheep skins.

On a cross-examination—Chapins gave their note, payable in 60 days; said they had insurance on a large shipment. Their establishment was more extensive than any other in Cincinnati. One hundred and fifty men were employed in the factory, beside outside laborers.

J. K. Thomas—Witness shipped 20 barrels hams on board the Martha Washington.

Mr. Zimmerman—Lives in Lexington, Kentucky; is in business there, and makes his purchases in Cincinnati. In 1851, bought some small bills of Chapins. The next spring bought from them 100 cases of boots, and 10 cases of a different quality. But in Lexington such articles could be purchased lower than in Cincinnati.

On the cross-examination, witness said the stock of the Chapins did not appear to be heavy, and in the spring of 1852, it was very small. Burton called on witness to know what he could prove.

John H. Ballance—Lives in Cincinnati. Tans sheep skins. There was a demand for them in the winter of 1851-2. 1600 dozen of sheep skins; never saw so many together. In a bale there are from 200 to 240 pounds.

Wm. Parvin—Witness lives in Cincinnati, and is engaged in the trunk business, which requires the use of sheep skins. In 1851-2 several such establishments in the city who use sheep skins. Never saw a lot of 1600 dozen of sheep skins at one time.

Samuel J. Raney—Has been engaged in the leather business fifteen years. In December, 1851, and January, 1852, the market was heavy. White sole leather was very scarce. Two hundred bales of white sole leather would require 1200

sides. Witness had no knowledge of that amount of white sole leather in Cincinnati. Red sole leather is worth 16 cents; white, 20 cents.

Mr. Thornton—Is a manufacturer of sheep skins and morocco; calf skins. In 1851-2 knew no one who had 1200 dozen of sheep skins.

Mr. Kesler—Witness is a leather dealer and manufacturer of leather. White and red in Cincinnati and New York. Two hundred bales would be a large amount to have in the fall. Witness never saw two hundred dozen sheep skins at once. He has known the firm of Chapins for some years.

Mr. Caton—In 1851-2, was reporter to the Chamber of Commerce. Took an account of all the freight, and recorded it.

Such a report the court held was not evidence unless sworn to.

John Sheier—Witness is a map publisher in Cincinnati. He shipped on the Martha Washington three boxes of charts. Nicholson inquired if he had not better send on board of some other boat. He said that he was part owner of the boat. He said he had invested every thing he had. Said he was insured, and would make a spoon or spoil a horn. Nicholson said he owned the bar.

Mr. Crammond—Witness was on the river, in January, 1852, about one hundred miles below where the Martha Washington was burnt; stopped at the place Saturday night; next morning went on board the wreck. On Monday went on board as wreckers. Commenced their work on Tuesday, and continued Wednesday. Found on board, oil, soap, grease, oil kegs, and butter. Found no rolls of leather, or sole leather; no pistols. The bow of the boat was lying up the stream. Witness asked the mate how the boat took fire. He said he supposed it must have caught in the brooms piled on the larboard side of the boat from the chimney. The deck was burnt. Witness found 20 bbls. of pork; 50 kegs of

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lard ; five or six barrels of flour ; five or six kegs of butter ; five or six barrels of whisky ; some soap grease.

Not one of the barrels bore the marks of fire ; nor the sacks of corn which they found. Holland ordered the wreckers to desist, but they refused, and said he had no right. The other party of wreckers,—for there were two parties,—carried away the property, with a good many threats. Chandler made his appearance at the wreck, and claimed to be agent, and exhibited some papers. He remained two or three hours, and then left. Chandler claimed no property ; only claimed to be agent.

Mr. *Burdell*—Witness lives in New York ; is a part of the firm of R. H. Burdell & Coq; Messrs. Smith & Kissane shipped to the company 300 barrels of pork. Witness proposed he should ship it at \$12 per barrel. Said they had shipped on board the *Martha Washington*. Insurance was taken at \$15 per barrel. Worth that at New York.

Mr. *Taggart*—Lives in Arkansas, near the wreck. Found on the boat, whisky, pork, oil, &c. Nicholson requested witness to take possession of the property saved from the wreck. Chandler and Cummings came together in a skiff. Chandler took charge of the property for New Orleans. Heard Capt. Cummings call Chandler by name. The property was to be left with a man called Jordan at New Orleans if Chandler should not be there.

On his cross-examination, the witness says, Cummings called Chandler by name. Heard nothing of any other individual called by the same name. Did not know Chandler. He was to reclaim the property wherever it could be found. McNeal was to go with Chandler. Cummings sold some of the pork, which was not good, the brine having leaked out of it. He sold it at \$11 per barrel. It was seven or eight days after the burning before Capt. Cummings came to the wreck.

Mr. Wheeler—Lives in Boston. Secretary of an Insurance company. Took a risk on board the *Martha Washington*, through the instrumentality of James Lee & Co. Property insured, 250 barrels of mess pork, 100 tierces of oil. Total, \$5,347 50,—for Lyman Cole. The bill of lading or invoice was in Kissane's handwriting. Shipped also, 167 barrels mess pork : 6th Jan. Smith & Kissane, 83 barrels mess pork, 100 tierces of lard. Papers in the handwriting of Kissane. Mr. Lee accepted ; papers were handed over when the insurance was paid.

M. L. Neville—In 1852, witness was Secretary of Firemans' and Mechanics' Insurance Company. Insured for Capt. Cummings, \$2,500, payment made by Cassilly to McGregor. Paid some to Kissane. Cummings said he lent the money to him. This company refused to contribute anything for the investigation of the case.

Mr. Davenport—Lives in Boston, and is a manufacturer of boots, and shoes, &c. Received a letter from Capt. Cummings, dated 15th October, 1851, for certain cases of boots, &c. 150 dozen sheep skins were insured by witness for Filly & Chapin ; loss paid to the acceptor of their bill. The letter stated the loss was total. Amasa Chapin was authorised to collect debts due Filly & Chapin.

Mr. Tabor—Witness lives in New Bedford, Massachusetts. On the 8th of January, 1852, he received a letter from Lyman Cole, dated at Cincinnati, requesting an insurance on goods on board the *Martha Washington*, to about \$2,000, on 100 tierces of lard ; the bill of lading was signed by Lyman Cole, but was in the handwriting of Kissane. On the 26th January, witness received a letter from Cole ; wrote another letter dated Oxford, complaining that he had received no answer.

Mr. Riley—Witness saw Nicholson a short time after the boat was burnt, at New Orleans. He asked McDano, Cap-

tain of a steamer, to bring some freight down from Memphis, on the bow of the boat.

Witness said, on his cross-examination, since 1832, he had been on the river as pilot and captain. He stated that the *Martha Washington* carried a large amount of freight when loaded down to the guards, and, in addition, could carry one hundred and fifty tons.

John S. Tappan—Lives in Brooklyn. Was Vice President of Union Insurance Company in 1852. Mr. Kemble came to his office, 12th January, 1852, and applied for an insurance; said he had \$10,000 to insure, and witness concluded to take the risk to New Orleans. 26,000 pounds of white sole leather, 200 rolls, in his own name. He held his hand over the names of Filly & Chapin and Lyman Cole. Kemble said he did not insure to New York, because the freight might be sold at New Orleans. On the 16th January, 1852, saw in the *Courier and Enquirer of New York*, that the *George Washington* had been wrecked, and that the *Martha Washington* had been burnt. On the 31st of January, 1852, received a letter from Kemble, stating the loss of the *Martha Washington*. A despatch of the loss from Capt. Cummings was received by Kemble, and an inquiry was made whether they would pay; the witness answered no. Kemble stated to witness once his interest in the cargo was equal to his insurance. At another time he said it was not, and that some one else was concerned with him. He never showed to witness that he was entitled to this property, except the invoice covering the names signed. Cole had an interest, and another person. Kemble refused to state the other name. Said he would write to Cincinnati; but did not.

On the cross-examination, witness said the articles invoiced were, as appears from the paper, 26,000 pounds of sole leather, and 1,600 dozen of sheep skins. The writing was rather a bill of sale than a consignment.

Eliza Martin—Was chambermaid on board the *Martha Washington*, and was in bed in the last berth but one in the ladies' cabin. Late at night heard the cry of fire. Went to the folding doors; saw fire in the gentlemen's hall—inside of it. Witness went to the hurricane deck. Carswell helped her from the deck to the land. The boat was landing when she got off.

Mr. Whitney—In January, 1852, witness was secretary to the Madison company. Agent of that company at Louisville took a policy. A. Chapin took the insurance; 200 cases kip boots, signed Filley & Chapin. More than a month after the loss, Mr. Chapin called at the office in Madison. The amount of the insurance was \$4,200, which witness did not pay.

Mr. Jones—In New York, in January, 1852, witness was an underwriter in the Atlantic Insurance office. On the 7th of January, 1852, took an open policy—300 bbls. of pork, \$4,500; 264 bbls. of pork. Smith & Kissane shippers of the first, Ray of the latter.

J. B. Wilson—In March, '51, witness was assessor. Stock of Filley & Chapin assessed at \$3,500.

Mr. Clark—Lives in Cincinnati. Knew Filley & Chapin. Made them temporary loans in the fall of 1851. Made to them weekly loans from one to three hundred dollars. He had difficulty in collecting the loans, &c.

Mr. Lane—Mate of the steamboat *Martha Washington* at one time. She would carry 550 tons.

Mr. Scarborough—Lives at Cincinnati. Had two invoices in his charge, as counsel for investigation. Insurance on the invoices amounted to \$5,458. The Chapins said Cole was interested. Had frequent interviews with one of the Chapins, but received no explanations with which witness was satisfied.

Mr. Shepard—Knew Chandler in Covington. Was a sportsman. Saw him in March, 1852, in New Orleans. As wit-

ness was walking the street Chandler came out of a house to see him. Stated that he was on board the Martha Washington. Reached the land by a line on the stern of the boat. Said that he had been employed by Capt. Cummings, at \$5 per day. Witness said that Chandler had consulted him as counsel, and that he was not bound to disclose.

Mr. Morton, District Attorney—Read a copy of a letter from Kissane to Nicholson, after his arrest, and was about to state the circumstances under which the letter was abstracted from his papers, when the defendants' counsel objected that such statements could not be received as evidence.

The Court—As the abstraction of the letter was a penal offense, for which the person taking it was liable to be indicted and punished if found guilty, the act of purloining the letter could not be received as evidence; but they said, as explanatory of the transaction, and to show the motive of taking the letter, they would hear the statements of the witness.

Mr. Morton then proceeded to state that the original letter, the copy of which he had just read, was with his other papers, carefully tied up and left in his desk, the door of his room being locked, while he took a short ride in the country. On his return he found that his papers had been handled—were in confusion, and the original letter of Kissane had been abstracted. And other facts were stated, conducing to prove that Kissane took the letter. In the absence of the witness the chambermaid probably entered the room.

Mr. Taylor—Lives in Cincinnati. Has been engaged in the leather business, and carries on the largest establishment in the city. White sole leather is more valuable than red; the white is tanned with chestnut oak bark, and will weigh from eighteen to twenty pounds a side. In the winter of 1851–2 white sole leather was scarce and in demand. Witness had no idea that there was any thing like 200 rolls of that leather in the city, or that there were 1700 dozen of sheep skins.

On being cross-examined, the witness says that leather would sink when saturated with water, also sheep skins would sink under similar circumstances.

Mr. *Walker*—Walker & Co. shipped on board the *Martha Washington* in 1852, 100 bbls. of whisky and 360 bbls., as per bill. Delivered the 7th January.

Mr. *Polard*—In January, 1852, shipped on board the *Martha Washington*, merchandise, soap, candles, tobacco, $\frac{1}{2}$ bbl. of butter, 2 doz. brooms, 4 bbls. rectified whisky, 2 do crackers. On 7th January, 1852. Copy of invoice: Kissane & Smith, 7th January, 1852. Amount \$3,360. Destined to Freeman & Sons.

Mr. *Carpenter*—Lives in Cincinnati. Business, loaning money. Loaned money up to the time of the failure of Filley & Chapin. When they failed they owed him \$250. Went to them and bought \$750 worth of goods. Witness settled with Cole, who required him to buy as above.

Mr. *Pomroy*—Lives in Cincinnati. Firm of Robins & Pomroy. Engaged in shoe business. Manufacture in Massachusetts. In the summer and fall of 1851 purchased 599 dozen sheep skins. Packed up at other places than their own house. White sole leather, witness thinks, was scarce in 1851.

[A bill of lading read, signed by Nicholson. Shipped for Cooper 25 tons of goods.]

Mr. *Hubbard*—Is the Superintendent of the House of Refuge. Did the stitching of boots for the Chapins. In Nov. stitched 559 cases or dozens. In December, 257 doz. In October, 100 doz. Witness was at the Chapins' store almost every day. Did not see large quantities of leather on hand.

On his cross-examination, witness said he never was in the cellar more than once or twice. Never in the two upper stories of the building.

Mr. *Chew*—Capt. Cummings applied for an insurance on the steamboat *Martha Washington* for \$4,500, in the name of Lewis Choate, which was taken by the witness. After

the boat was burnt, sent Charles Ross as an agent to look after the interest of the Insurance Company. In February following, Capt. Cummings and Capt. Choate demanded the insurance money. At the request of witness, certain deck hands were sent to the insurance office to give an account of the loss of the boat, who were examined in the absence of Capt. Cummings and Holland.

Capt. Cummings referred witness to two deck hands on the boat who could give him information. They came and had a communication with the witness. A part of the conversation was in the presence of Cummings and Holland.

Objection being made, the court held that the statement of these hands in the presence of Cummings and Holland might be received, but that part which was made in their absence was not evidence. The statements received as evidence had no material bearing in the case. The reference to the deck hands was not such as absolutely to bind Capt. Cummings to whatever they might state.

Mr. *Lee*—Lives in Cincinnati. Shipped on board the Martha Washington 100 barrels pork and 200 barrels of flour, amounting to 37 or 38 tons.

Mr. *Shellito*—Shipped on board the Martha Washington 100 bbls. red oil, 50 bbls. soap—25 tons.

Capt. *Irwen*—Once commanded the Martha Washington. When loaded within six inches of her guards might have 450 tons. Loaded to the water, 500 tons. Carried 517 tons.

Mr. *Cotral*—Is a partner or agent in the City Manufacturing Company. Cole introduced Mr. Stephens, who bought brandy of witness—a number of barrels—and paid for it in staves.

Mr. *Caton*—Is agent of the Chamber of Commerce, and his duty is to take an accurate account of all shipments, &c. He presented his record of entries made of articles shipped by the Martha Washington. He could not state positively

whether he took the list of articles from the agent of the Martha Washington for freight, or from the second clerk of the boat. His memory being refreshed by examining the book of the agent for freight, but he could not distinctly recollect where he got the items.

The court held that the entry of the articles could not be received in evidence. The witness was not able to say where he got the items, and much less could the court or jury decide this fact, on which the admissibility of the evidence rested.

Mr. Carswell—Belonged to the boat. He was asleep in a berth in that part of the boat called Texas. The bell being violently rung by Capt. Choate, the pilot, waked him. He heard also violent stamping on the hurricane deck. This was about one o'clock at night. Witness saw the chambermaid and carpenter. Helped the chambermaid down to the lower deck, then the carpenter, and then the witness got down. Saw the fire extending back to the stern of the boat. The bank at which the boat landed was high. The boat was not fastened to the shore, the rope being frozen, and it soon floated from the shore. The Charles Hammond came along in about an hour. The passengers generally got on board of her, wet and almost frozen. The chambermaid, cabin boys, &c., got on board of the James Shillinger, which was going up the river.

The fire took place about five miles from the wood-yard. After the alarm of fire it was not more than ten minutes before the boat was in a blaze through the cabin. No power could control the hands. Every one escaped for his life.

Mr. Murray—Lives in Cincinnati. Is a drayman, and was engaged in the same business in 1852. He run from six to eight drays. He hauled for the Chapins. Hauled six loads for them. Load of sheep skins; red sole leather. There were four or five large loads of leather, and some boxes.

Charles Gibson—Worked in the establishment of the Chapins about five years, including October, 1851. The store was the corner of Pearl and Main.

R. C. Lepper—In 1848 witness was clerk on board the Martha Washington. The witness recollects once she carried 585 tons.

Capt. Ross—Witness for many years has been on the river as captain or pilot. He was appointed agent for the underwriters, and proceeded to the place where the boat was burnt. It floated down the river about six miles from that place and sunk. Witness went on to New Orleans. Was referred to McGregor, at New Orleans, as the agent of the boat. He was twenty-four hours in finding Jordon, the consignee of the cargo. Nobody seemed to know him. He was a dealer in pamphlets. He could give witness no information. Jordon said Chandler had nothing to do with the cargo. He did not know him. By the bill of lading Chandler was the shipper. Another bill of lading was to Jordon. The Martha Washington will carry 575 tons. Witness got no satisfaction from Jordon.

Mr. Wheeler—Worked nearly three years with the Chapins. His business was to put bottoms to boots. Worked in January, 1852, and he thinks, in February, for Cole. Worked for Filley & Chapin through the summer of 1851. In September boots did not sell as fast as they were made. Never worked white leather in kip boots—put white sole leather in calf boots. Never saw sheep skins, except what were necessary for use.

Mr. Carswell cross-examined—While at the boat, the impression was that the fire was accidental. Heard nothing to the contrary until about two months afterward. Capt. Cummings appeared like a crazy person, by his gestures and exclamations at the loss of lives.

Mr. Remur—Remur & Sons, of Baltimore, made an advance for 600 boxes of candles, \$3,360. Insured to New

Orleans. From the insurance witness paid his advance, and the balance was paid to Kissane.

Mr. Wheatley—Was a clerk of Smith & Kissane. Witness accompanied the latter to swear to the shipment of 600 boxes of candles, and witness swore to it, not knowing anything about it, and this was known to Kissane. After they left McGuffey, the person who administered the oath, Kissane said to witness he would never hear of it again. Afterward witness swore to the same fact before a Commissioner. He was in the habit of getting bills of lading. He did not see Kissane tear out this bill of lading from the book.

John Phillips—Worked as a boot bottomer for Filley & Chapin. Was in the store every week. Used red sole leather and white. No more leather of either kind than was necessary to carry on their business.

Mr. Ford—Witness worked for the Chapins in September, 1851; left them the latter part of that month. Had worked for them three years before that time. Don't know that he saw a large stock of leather while there.

Mr. Butler—Worked for the Chapins three years ending in the fall of 1851. Hands pushed to send boots to Louisiana. There were three crimpers employed.

Lewis Choate—Was pilot at the time the boat was burnt, and was on watch. While at the wood-yard he was in the social hall. Capt. Cummings and Nicholson were there also. He remained there until the wood was in, and then ascended to the pilot-house. Capt. Cummings came up; stood in front of the pilot-house; turned round and came into the pilot-house. The boat had not proceeded more than five or six miles from the wood-yard before he smelt paint burning. Witness said to Capt. Cummings, there was fire. He ran down fronting the pilot-house, looking over the hurricane deck, and said, You are mistaken. Witness replied he was not. Capt. Cummings then ran down to the cabin deck. The mate (Holland) was on the hurricane deck. Said the

wood taken on board was very dry, and said he would go down.

Witness rang the bell violently and stamped; made a good deal of noise. In a very short time after smelling the fire (a minute or two) the fire burst out. Heard no noise in the social hall. The clerk (Nicholson) said he was sitting in the social hall, with boots off and sleeping. Did not know of the fire till witness gave the alarm. He then alarmed the passengers. The fire was bursting some of the windows.

While the boat was at the wharf at Cincinnati, Capt. Cummings introduced witness to Nicholson, and said he had promised the clerkship to him at the Springs, in Kentucky. Witness communicated to Capt. Cummings something he had heard said of Nicholson, not favorable. Capt. Cummings went to the person who had made the remark, and inquired of him about the matter, and, on his return, said he could ascertain no definite facts.

Cross-examination—Capt. Cummings owed \$1,500 in New Orleans, and was afraid the boat might be attached; and it was on this account that the title to the boat was vested in witness. Witness advised Capt. Cummings to leave Cincinnati late at night, as he would gain more by doing so than by remaining.

The boat was about three hundred yards from the shore when he first saw the flames. Thinks the fire could not have been extinguished. He had no suspicions at the time that the boat had been set on fire. Such a suspicion was not uttered by any one.

Witness heard Capt. Cummings call Ross agent, and proposed to pay over to him the money, and show him the invoice of the sales of the freight saved from the wreck. Ross said he did not feel himself authorized to receive the money.

Witness called with Capt. Cummings for the insurance on the boat. On the second call Chew said he had received a letter from Capt. Ross, who advised the company not to pay.

Witness saw the Board of Underwriters, and before them insisted that the parties on the boat should be arrested. A second time witness insisted that the parties should be arrested, in order to bring the matter to a full investigation. Mason charged Capt. Cummings with burning the boat. Shortly afterward when the Capt. met Mr. Mason at the Burnet House, he knocked him down, &c.

The Underwriters said their object was to protect themselves. Witness did not think Capt. Cummings was guilty of burning the boat. Since the above witness has seen some things which he did not like as to the boat being burnt—not in reference to Cummings. Where the chimney rests on the boiler fire may be communicated. In thinking there was something wrong witness referred to Nicholson.

Mr. *Favor*—Witness came up the river on steamboat Breakland. Capt. Cummings, Capt. Choate, and Nicholson, were on board. All on board of the Emperor. Had some conversation with Nicholson, who said when the fire broke out in front, he first heard the alarm. Ran into the ladies' cabin. Said the boat was well sold. This was the 25th, 26th, or 27th of January, 1852. [Other witnesses who knew Nicholson, and who came up on board the said boat, said he was not on board.]

Mr. *Chew*—Holland said to witness, after the boat had wooded, and as she was rounding out, he went into the social hall, where Nicholson was sitting asleep. Sat half an hour. Went to the bar, drank something. After some time saw fire in a state-room where mattresses were deposited. Boat was turned toward the shore, was made fast, and the passengers were taken off. That he was left in charge of the wreck. As property was taken on shore it was stolen; there was only one honest man there. The line was not made fast, and when the starboard engine ceased working the boat swung out into the river.

On his cross-examination, the boat was insured for \$4,500.

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At the meeting of the company it was not intimated that the boat had been burnt designedly. Choate said that if there was fraud the defendants should be arrested. Nicholson remained in the social hall asleep, as Holland stated, until the fire burst out.

Mr. *Traner*—Lives in Cincinnati. Engaged in the Shoe business in November and December, 1851. In November bought seven bills, one a case of kip boots, of the Chapins. In making these several bills, witness was in the Main street store and cellar. Saw three bales of white sole leather, 29th November, 1851. Saw sheep skins in the upper rooms; five bales at one time. White sole leather fluctuates.

On being cross-examined, witness stated the cellar under the Main street store was dark, and that there might have been rolls of leather in the cellar which he did not see. There were 408 cases in the lower store or room.

J. A. Dugan—Was at New Orleans; saw Nicholson there.

Here an objection was made by defendants' counsel, that after the boat was burnt the act was consummated, and that the confessions of one can not afterwards implicate the other defendants. And it was urged that the boat, to charge the defendants, must have been burnt with a fraudulent intent, to injure the insurance offices. And it was insisted if the insurance companies resist the payment of the money, and the defendants shall fail in the recovery, the offense charged would not be sustained. And to sustain the points urged, there was cited Wharton's, 6; L. 261—3; 8 Car. & Payne, 297; 1 Phill. Ev., 97; 1 Greenleaf's Ev., 136, sec. 111; 3 Greenleaf, 88, sec. 94.

The prosecution contended that the partnership or combination was not ended until the money was obtained, and cited 2 Starkie, 32; 1 Greenleaf, 111; 11 East., 584; 2 Pet., 364; 4 Wend., 261.

The court held that it was not necessary to prove the burning of the boat to sustain the indictment against the defend-

ants. If they conspired to burn the boat to defraud the insurance offices, the offense was consummated. In this we see the wisdom of the law. The crime was committed before the perpetration of the overt act. The punishment of the conspiracy to do the act makes the incipient stages of the offense as criminal, and by that means intends to arrest the consummation of the crime.

The act of burning the boat is evidence in the case, as it may, connected with other facts, show a conspiracy, or conduce to show it. But this is not a point in the evidence beyond which the prosecution can not go. The conspiracy may be inferred from attempts to obtain the money. The entire transaction is a matter for investigation, by which the innocence or guilt of the defendants may be shown. As the burning of the boat is not, necessarily, an act to consummate the offense, it can have the effect only, like any other fact which conduces more or less to show the nature of the transaction. The witness may proceed in his statement.

Mr. *Dugan continued*—Nicholson said that he had been in bed ; heard a roaring ; got up and saw the fire.

A. *Jones*—Lived in Cincinnati in 1851-2. Is a relation of Filley, the partner of Chapin. Filley died the 28th of October, in the year 1851.

Mr. *Mason*—Lives at Buffalo. Was at Cincinnati in the spring of 1852. Called on Nicholson to ascertain the facts of the loss of the boat. He said he got up about midnight at the wood-yard where the boat stopped to wood, and paid for the wood. He said that he sat down in the Social Hall ; fell asleep, and was awaked by the ringing of the bell. At first saw nothing, but soon discovered fire bursting from the state room near the chimney.

Witness wished a memorandum of articles, which he could not give. Nicholson introduced witness to Capt. Cummings, who knocked witness down.

Davis & Co.'s bill of lading, 11,477 lbs.

Mr. Carson—Lives in Baltimore. The insurance, according to the invoice, one hundred dollars more than the amount and upwards of five hundred dollars above the amount advanced to Smith & Kissane. The surplus was paid over to them.

Mr. Johnson—Witness is a confectioner. Was cook on board of the *Martha Washington*. When loaded at Cincinnati her guards were from six to ten inches out of water. Nicholson kept the *Esculapian Springs*, in Kentucky. He and Cummings agreed to purchase a boat, and the *Martha Washington* was purchased.

The fire occurred in the room aft the chimney on the larboard side. The carpenter was in the same room with the witness. The clerk's office was on the starboard side—partition between the room and chimney. Nothing in the first room aft. Was awakened by the ringing of the bell, and stamping. Looked through the inner door—saw fire in the Social Hall. Waked the carpenter, who was sleeping in the same room. Passed through the Social Hall into the cabin. Saw Nicholson running (towards the hall) in the cabin. Witness then went down to the lower deck—there saw Holland and Nicholson.

When witness first saw the fire it was about four feet at its base, and its blaze ascended to the ceiling. Boxes were piled up on the larboard side of the social hall—on these boxes were piled several bundles of brooms, and of brown paper. The fire was burning on this paper three or more feet. Nicholson kept quiet. Capt. Cummings in great distress returned to the boat. He was without hat or coat, and used great exertions to rescue the passengers. A man could not live more than two minutes in the water, the cold was so intense. The witness believes the fire was communicated to the boat from the chimney.

Mr. Heartwell—A bill of lading of Smith and Kissane, dated early in March, 1852, appeared to have been written only

a few hours before, signed by Nicholson, was presented. When he first saw the bill the ink was blue and fresh; afterward it became black. Burton at this time was not known to the underwriters. Loaned Burton \$2,000, indorsed by Dennison. Afterward made another loan of \$1,000. No interest has been received. The note has been twice renewed. Insurance offices agreed to take the notes without indorsements. In January, 1853, the company advanced \$850. Subsequently advances amounted to a little more than \$4,000.

Mr. *Lee*—Lives in Boston, and was engaged in the commission business in 1852. In pursuance of a request of L. Cole, witness insured for him, for mess pork on board the *Martha Washington*, \$5,000. Insured 10 per cent. profit.

Register of the *Martha Washington* given in evidence, specifying it to be 350 tons, &c.

Mr. *Burton*—Lives in Ohio City. He became acquainted with two of the Chapins in 1846, within which year they failed. He knew L. Filley, the partner of Rufus Chapin, and did business with them and continued to do business with them until the 3d December, 1851. He sold to them 160 dozen, of sheep skins, and deposited with them 182 dozen. A short time after witness returned home, Rufus Chapin came to Cleveland, and calling on the witness, said he wished to procure a note discounted for six hundred dollars. Witness went with him to the bank, but could not procure the discount of the note. Chapin wanted to buy white sole leather. Witness went with him to a large leather dealer in Cleveland, but he would not sell on the terms offered.

Witness again went to Cincinnati about Christmas Eve. Called on the Chapins the next morning, and found Lyman Cole with them. He inquired for the 182 dozen sheep skins which he left on deposit, and with the view of securing the Chapins for a note they had indorsed for him. He applied

for the sheep skins, Cole being in possession of the property. Cole said: Let Burton go to the devil with the rest of the creditors. Filley, and Burton, and Earl, witness says, made an estimate of the stock, amounting to the sum of \$8,500. Witness saw all the Chapins at R. Chapin's, and also Kisanee. Cole and Capt. Cummings were at the Chapins. They had not 200 rolls of white sole leather. Saw a very small amount of that article. Witness also met Adams Chapin.

The witness was greatly displeased that the bales of sheep skins which he left on deposit were not delivered to him, and threatened to bring suit. It was arranged that witness should be made secure through one of the insurance offices. This was after the loss of the boat. The insurance in the name of Kimball was the office designated. Adams Chapin promised that the insurance papers should be ready. Having received the papers, witness went to Owego to Kimball. Witness found him keeping an eating house near the railroad. He walked with him some distance and sat down on a log. Witness informed Kimball that he had come to get his money from the Chapins, and if he did not pay him in fifteen minutes he would blow up the whole plot. Kimball said if he did he would blow up \$60,000. Kimball agreed to meet him in New York and pay him his demand, if the insurance money could be obtained. But he failed to obtain the money. Witness again threatened, and said he would expose the whole transaction. Kimball said Cole was never yet caught.

Some time after this he saw Capt. Cummings, the Chapins, Cole, Kimball, and others, and told them that they *had got* to pay him. The Chapins complained that the offices would not pay. Witness asked for bills of purchase. Was informed that the bills had been burnt by Chaney, the purchaser from Cole, supposing they were of no importance. This was the forepart of June. Chaney was a brother-in-law of

L. Cole, and had bought out Cole, and was carrying on the business at the same place. Adams Chapin said Filley & Chapin had put \$5,400 in the boat.

Witness saw Scarborough and had some conversation with him respecting the transaction. Also had some conversation with Filley, after his father had been out to see him. Cole and Kimball had an interest in the shipment. Witness told the Chapins they had never shipped the sheep skins.

The next visit the witness paid to Cincinnati his life was threatened. Amasa and Lorenzo Chapin came into his room at the Dennison House, and inquired what he was going to do with or to them. This was the 20th October, 1852. Witness replied that he was going to take them through. They said they were too hard for that. The witness replied, we will see.

The witness received letters from Filley & Chapin, asking him to forward to them sheep skins. At the time the witness sold to the Chapins 160 dozen of sheep skins, he deposited with them 182 dozen, which were stored. Chapins gave him a note for his accommodation, to pay for the skins sold by him. The defendants said they had not bought 50 dozen of sheep skins, except from him. This remark was made by Adams Chapin, Filley, and Rufus Chapin.

On cross-examination, the witness said that the 160 dozen were all the skins which witness sold to the Chapins the last time. Paper presented, signed by witness, for 112 dozen afterward. Witness took 2,900 dozen sheep skins in the years 1849-50 to New Orleans; 5,000 dozen during the spring and summer of 1850; 6,000 dozen in 1851. He says 100,000 dozen might have been manufactured in Cincinnati in 1851. The firm of Filley & Chapin, at the time of its failure, owed the witness \$2,560. Adams Chapin asked him of whom they got the sheep skins. Said they got them from the witness, and the witness answered it was right. The witness then inquired of whom they got the sole leather. They replied, from different persons. Witness asked in regard to

several sums of money alleged to have been received by him from certain insurance offices, which question was objected to ; but the court held that the witness might be called to explain the facts attempted to be proved, as to moneys received by him, as such facts were intended to be used against him. The witness admitted the receipt of \$5,500 from the insurance offices, and, in addition, \$7,000, which had been advanced by his brother, who lives in Vermont, as a loan.

Mr. *Darr*—In Milne's office payment was made for the Martha Washington. A deposit was made, to secure the purchase, in Milne's bank. The following sums were paid : By McGregor, \$1,000 ; check of Smith & Kissane, \$1,000 ; by Capt. Cummings, \$1,100 ; in currency, \$1,700 ; transferred credit to McGregor, \$2,000.

Capt. *Ross*—Boat was registered in the name of Choate, because there was a judgment of fifteen or sixteen hundred dollars against Capt. Cummings in New Orleans. One trip in the name of Choate.

Mr. *Bretonhall*—In 1851 lived in Cleveland. In the winter of 1851 Chapin applied to him for white sole leather, and said he could not get white sole leather for use. Said he could not get it at Cincinnati. This was before Christmas.

The testimony on the part of the prosecution having closed, Mr. Ewing, of counsel for defendants, moved that Kimball be discharged, on the ground that no evidence had been given which inculpated him, in any respect.

The defendant rose as soon as his counsel had closed his remarks, and expressed a wish that the motion made by the counsel should not be insisted on. That he would abide the fate of those who were associated with him in the indictment.

The counsel then waived the motion.

The counsel for the defendants called their witnesses. Many of them answered to the call—others did not. An in-

quiry was then made of the court by the defendants' counsel, whether it was necessary the witnesses should be sworn, to entitle them to claim their fees. The court intimated that it might be considered necessary for the witnesses to be sworn, by the accounting officers of the Treasury, and that it would be the safer course to swear them. At the same time the court said they did not consider it necessary. The counsel then observed that they did not intend to examine all the witnesses summoned, but only those that were considered the most important. And as it was near the adjourning hour, the defendants' counsel stated that if the court would adjourn for dinner, it being within thirty minutes of the time, the counsel would so arrange their testimony as to shorten the time of examination. On that condition the court rose until two o'clock.

After the close of the testimony by the United States, Judge Walker, in the defense, made the following statement :

May it please the court : The duty of making a preliminary statement of the points for the defense has been assigned to me. And, as I am, in this, to speak for all the counsel, and all the defendants, it became necessary, as I thought, to reduce this statement to writing, and submit it to my associates for their approbation. The same reason makes it proper that I should confine myself now to what I have written. I therefore ask leave to read to the jury what I have now to say. I think this course will conduce both to brevity and precision.

Gentlemen of the Jury : You have listened to the preliminary statement on the part of the government, and have seen how far the promises then made have been performed.

You are now to hear from the other side, and in the theory of jury trials, your minds are still as open and uncommitted as when you first entered that box. This is the theory ; and

I trust it is the fact. I hope and trust that you are prepared to listen to our defense patiently, candidly, earnestly and without bias.

The parental government under which we live desires no victims. These defendants are as much her children as you and I; and she has deputed you, their brethren, to try them, under a solemn injunction to presume them innocent until guilt is proved. The burthen of this proof she takes wholly upon herself, giving to the accused the benefit of every doubt. For it is better, far better, that ninety-nine guilty persons should escape human punishment, than that one innocent person should suffer it.

The meaning of verdict is a *true word*; and this *true word* you have sworn to pronounce as to each of these prisoners. You are not required to find the same verdict as to all. You can convict some and acquit others, if the testimony so requires; but you can convict no one unless your minds are forced to that result by evidence which is irresistible. I do not say that you must find innocence *impossible*; but I do say that you must find guilt *morally certain*. It must be one of those strong probabilities, bordering so closely upon certainty, that in any of the most grave concerns of life, you would treat it as a certainty, and as such, stake your life or liberty upon it, if the occasion required.

Your verdict is to be in form *positive*—*guilty* or *not guilty*. But in *practice* this does not mean that you feel absolutely sure of guilt, or sure of innocence. If you say *guilty*, it implies that the evidence so clearly preponderates that way, that you do not find room for a reasonable doubt. If you say *not guilty*, it implies that guilt is not satisfactorily proved—not that the defendants are necessarily and undoubtedly innocent; but that they may be innocent—perhaps are innocent. It means what the Scotch verdict of “*not proven*” means—that government has not performed what it undertook, namely, *to convince you of guilt*.

I shall make no appeal to your sympathy, but only to your perception of truth, and sense of justice. Be *sure* of guilt before you pronounce the irrevocable word, for, so far as you are concerned, that word will remain irrevocable until the day of judgment; and not only be sure of guilt, but of the particular guilt charged in the indictment. No matter what other acts, whether criminal or illegal, these defendants, or some of them, may have committed, if they are not proved guilty of this *very crime*, they must be acquitted.

What, then, is the charge preferred against these men? It is, that they conspired together to burn this boat with intent to injure underwriters. You have been told that the offense is complete, when the conspiracy is formed,—that no overt act is necessary, and the like. This is true. But then the conspiracy must be definitely found to have been formed for this object, namely, to burn the boat; and with this intent, namely, to injure underwriters. A conspiracy for any other object, or with any other intent, is not within the indictment. You might, for instance, be satisfied that there was an intention to commit fraud; but if it were against any other persons than underwriters—as creditors, for example,—or against underwriters by any other instrumentality than the burning of the boat, you could not convict. You are tied down by the statute and the indictment, to the fact of a conspiracy for this single object, with this single intent.

You are to find that all these men, or so many of them as you convict, *actually agreed together* to burn this boat with this intent. It need not be proved that they all met together at any one time, or in any one place; or that they wrote their names or plighted their oaths to this agreement. But, in some way or other, and at some time or other, before the burning of the boat, all who can be charged as conspirators, must have actually entered into this specific agreement; and this great leading fact as the soul and body of the offense, must be established by such definite and cogent proofs, as

leaves no room for any other conclusion. I would lay great stress upon this position ; and, therefore, I repeat that the actual formation of this specific agreement, and none other—including this very subject, object, and intent—must be substantively and conclusively proved.

Now the proof offered in this case is *wholly circumstantial*. No eye saw, no ear heard them actually conspiring together. No two of them were ever seen together under circumstances not entirely compatible with perfect innocence. I mean precisely what I say. No witness ever saw any two or more of these men together, when *their being so*, created in his mind the slightest suspicion that they meditated crime. They met as acquaintances, openly and publicly, and chatted as acquaintances, and that was all. The evidence, then, is wholly circumstantial, and, in the strictest sense of the word, not merely not positive, but the farthest from it possible. And although I do not deny that a verdict may properly be found on circumstantial evidence alone, if it be strong enough, yet I do not aver the settled rule to be, that in weighing circumstantial evidence, every circumstance is to be rejected, as *proving guilt*, which can exist consistently and compatibly with innocence.

There is another important rule with reference to the amount of evidence, which is, *that it must be proportioned to the enormity of the offense*. You would not convict for murder upon as slight evidence as for assault and battery, or petty larceny. This rule proceeds upon the idea that men are not fiends or devils—that in the most depraved there is still some good left, something to which stupendous crime is still abhorrent. Now, the charge here is of a stupendous crime—one of the deepest dye imaginable. When you come to analyze it, you can hardly conceive that men stamped with the form of humanity, could concoct or perpetrate it. And hence you will require the very strongest evidence to make you believe it—almost the *ocular proof*—for the first impulse

of every person, not utterly depraved, is to say, "it is incredible—I cannot believe it—it is too monstrous for belief—I should almost doubt my own eyes," and the like strong expressions.

There is one error which jurors not accustomed to weigh circumstantial evidence, are very liable to fall into. It is, to have regard for the *number* of the circumstances rather than their *nature*. And upon this the prosecution appears to have calculated largely. Now, circumstances are not like *faggots*, where each faggot adds just so much more to the bundle, but rather *like the separate links of a chain*, where the strength of the chain depends not upon the number of links, but upon the strength of each individual link. We might not be able, and certainly cannot be required to break this entire bundle of faggots, which government has tied so industriously together. But in this *chain of evidence*, which has been so long and so laboriously forging, we may be expected, and certainly shall be able to break many of the links, and so, we trust, sunder the entire chain. And in what manner we expect to do this, it is now my province to inform you. ●

Previous Acquaintance.—We expected to satisfy you that this acquaintance was not general, but quite limited; that each was not acquainted with all the rest, but some were strangers down to the time of arrest, never having even seen each other. But the fact that some, who are proved to have met, were acquaintances, so far from being cause of suspicion, would fully account for their occasional meetings. It was the most natural thing in the world, that they should meet, and meet often; and it is therefore, most strange, and indicative of a desperate case, that this fact of previous acquaintance, should be turned against them.

Relationship.—The four Chapins are brothers, and Cummings and Kimball married their sisters. But what has this to do with proving a conspiracy? I submit to any juror, looking into his own heart, to say whether the last person

whom he *could* make a confidant of crime, would not be his own brother—whether some *hallowed memories* would not cry out against it. But, however this may be, the fact of being brothers entirely accounts for their being together so often, and acting so much with and for each other.

Meetings—Much time has been taken up in proving that some of these parties did, several times, meet and talk together—at McGrew's boarding-house—at the Walnut Street House—at the store of Law—and at the store of Filley & Chapin—not that all or so many as half, even, did meet at any one time or place,—or in any secret or suspicious place—any den, dark room, or cavern,—or that they kept a watch or spoke in whispers, or wore disguises, or started at strange sounds, as conspirators would be likely to do, but simply that they met in open day, in the most public places, and talked politics, and laughed and joked, like any other persons. This is the whole extent, and it looks like arrant trifling, unless more were proved. It may show, that being thus together, and knowing each other, they *could* appoint meetings somewhere else, to form a conspiracy, if so disposed; but it does not even tend to show that they were so disposed, or did meet elsewhere, or did conspire. I would refer you, as a specimen of this whole class of witnesses, to L'Hommedieu, the president of a bank, who came all the way from Cincinnati to testify, that while boarding at the Walnut Street House, he saw three or four of these defendants, talking together three or four times—two certainly—exactly as they talked with all their acquaintances, and as all other people talk together.

Motives—When a great crime is charged, we naturally look for an adequate motive; and where several persons are charged with committing it, we expect an equally powerful motive as to all. This proceeds upon the idea that the veriest human monster, not absolutely insane, will not gratuitously and in mere wantonness, commit a great crime. Now the only motive here presented is, *gain by false insurances*—

and this could only apply to those who had effected insurances either wholly fictitious or greatly overvalued—and could not apply, either to those who had no insurance, or had insurance under the actual value; because they must inevitably be losers by the destruction of the boat. And we submit that there is no sufficient proof that any one of the defendants had an insurance wholly fictitious, or overvalued. At the very most a suspicion only is created in any instance; and although it is impossible, generally, to prove a negative, we expect to come so near to it, as to remove any suspicion which has been thrown over these insurances.

As to the insinuation that here was a *joint stock* concern, or *co-partnership*, in which all were to share the gains in some agreed propositions, it is a mere insinuation, unsupported by a particle of proof. There is no evidence which even tends that way.

Purchase of the boat.—It is claimed that this was the first overt act in pursuance of a conspiracy, previously formed. But we expect to satisfy you, that in this there was nothing in the slightest degree suspicious—that Cummings was the sole owner, though Choate's name was used, to avoid a seizure at New Orleans—that he paid \$9,000, which was all the means he had, and raised at the moment with no small difficulty—a difficulty which all the alleged conspirators together could not have experienced—that the value was less than first asked, and not an extravagant one—that the season was one of the best, and she would probably have paid for herself in three or four trips—that so far from being consummated in a hurry, the negotiation was postponed for one whole trip, to get the means together, and, in short, that every thing connected with the purchase, had the appearance of a fair business transaction—and so with the insurance. The boat was only insured for half her cost, \$4,500, and the freight list for about two-thirds, or \$2,500, which

last would have been considerably less, but for the advice of McGregor and Choate.

The alleged false shipments.—The proof by the government is wholly of a negative character. Dealers in leather do not believe Filley & Chapin had 200 sides of white sole leather ; nor dealers in sheepskins that they had 1600 dozen of them. Those who casually visited their store and factory, do not believe they had so many boxes of boots, &c., as purport to have been shipped. McGrew and his son think Edwards must have been a pauper dependant upon Stephens, and Stephens an adventurer without much means. These are fair specimens of this whole class of evidence. Now, we expect to meet this negative testimony, as to all who are here upon trial, by positive evidence that the goods were there. In this we shall not assail the veracity of the government witnesses, because they swear to no facts. But we shall satisfy you that one affirmative is worth a hundred such negatives. With respect to Filley & Chapin, we do not deny that they were attempting to place their property beyond the reach of their creditors. This, though not proper, is what many men in failing circumstances have done before ; and so far from tending to prove a conspiracy, it actually explains many circumstances which might otherwise appear suspicious. It accounts for the sale to Cole, their largest creditor, which was a real transaction. It accounts for their consignment to Kimball, and for the shipment by Adams Chapin. They were threatened with executions, and were determined to keep in their own hands the means of compounding with creditors. We do not contend that this was right, but we shall satisfy you that it was the fact. And, that in this view they did not regard a little loss by shipping to an eastern market. To them it was not like sending coals to Newcastle.

The capacity of the boat.—Here again we shall array positive against negative testimony. We shall show that the

boat was loaded to her utmost capacity ; and that, too, by the advice of the pilot, that she might run better through the floating ice. We shall also show that her capacity was fully equal to all that was claimed to be on board, whether we regard weight or bulk.

Developments of the wreck.—It is claimed that as no remains of leather, or skins, or boxes, were discovered, they never could have been on board. If we had not positive proof to the contrary, as we have, this inference would not be justified, because we shall satisfy you of the probability, at least, that what was not consumed by the flames, was washed out and sunk, before the wreckers took possession. As to the conduct of Holland in leaving the wreck as he did, no one can blame him ; and even if he deserved blame, it does not either make a conspiracy or prove one. The same remarks apply to Chandler, who received the savings by order of the captain, and offered to pay over the proceeds, but was refused. As to Holland, he certainly appropriated nothing to himself, but lost all. His life was threatened by those land pirates. He had no suitable clothing or shelter, and he could do no good by remaining. As to Cummings, he came to the wreck by the first boat, and did all he could through Taggart & McNeil. He put nothing in his own pocket, but simply made the things saved pay the salvage. The rest was placed in charge of Chandler, who is not here to answer for his conduct. He may have pocketed some of the savings, but this is no proof of a conspiracy. He certainly was not on or near the boat when burned, but came up with Cummings from New Orleans.

The Suspected Insurances.—I presume it is evident that no investigation was ever conducted with greater pecuniary means, or with more zeal, industry, and ability—which money can always purchase—than this. And yet, with all this outlay, there has not been discovered a single instance of double insurance, or a single instance of over insurance, or

a single instance of simulated freight. By this last I mean, that nothing of cargo has been found which was not what it purported to be—no barrels or boxes filled with bricks, or stones, or scraps of iron, or sand, or any other false contents. Yet, any one who has read the cases of conspiracy to defraud, either by false shipments or false insurances, must be aware that these are the contrivances generally resorted to. While here, the insurances are either wholly real, or wholly fictitious. There were no *effigies*. The goods were all there, or none there; and there was no seeming substitute. There was the actual thing, or nothing. This is one very remarkable feature of the case; and another is, that most of the insurances are proved by the government to have been real.

The insurance on the boat was real, and for only half her actual cost. The insurance on the freight list was real, and for much less than its actual amount. Cummings would have had it about one-third, but was persuaded by McGregor and Choate to put it up to \$2500, which was still much below its real value. So the bar insured by Nicholson in his own name—not in the name of Laws, as was testified by Chew—was a real thing; and no one who has traveled on steamboats can doubt that \$500 was a small valuation for the right to the bar, and the fixtures and liquors. Kissane's insurance was all the way to California—a useless waste, if the boat was never to reach New Orleans. The same remark applies to the ample outfit of the boat, and the supply of wood immediately before the burning. Conspirators for money would have been more saving.

The Letter of Kissane.—I trust you will read this letter very carefully, and more than once. I have done so; and it seems to me to be the natural outpouring of an almost broken-hearted, but innocent man. It has the hope and faith of an innocent man. Its caution to Nicholson, not to be arrested at present, and to take care of his papers, are justified by

his own experience, when arrested, manacled, and searched, "like a dog," as he says; and by the public clamor then so rife against all concerned. Its reference to Pugh and Gallagher does not in any way implicate those gentlemen, and simply looks to a fair trial, conducted by a prosecutor not hostile, and before a jury not packed. Its reference to the Chapins, though not altogether kind, is entirely harmless, referring only to placing their property beyond the reach of creditors. In short, there is not a word in it which an innocent man, whether under accusation or not, might not write to a friend who was under such an accusation as this; or such a suspicion as is referred to in the beginning of the letter—I mean that of the forgery—which may have been the object of writing the letter. As to obtaining possession of this letter, it is manifest that he considered its *interception* an outrage, which justified its *recaption* in any manner, and in this he will find many to agree with him. This *violation of letters*, for any purpose, is in itself a high crime.

Burning of the Boat.—This is charged as the *object* of the alleged conspiracy. The boat was actually burned, and you are asked to infer that the burning was by design—that she was set on fire purposely, and in pursuance of a previous agreement. This is the whole strength of the case made by the prosecution. If it fails here, it fails altogether. But why are you required to draw this inference? Certainly not from the mere fact of burning. Hundreds of boats have been burned before, and the same boat has been on fire fifty times in a year—so says Captain Irwin—and no such inference was drawn. But it is said the circumstances *indicate design*; and I admit that if this be so—if this boat was designedly and not accidentally burned—then some of these defendants ought to be convicted; but, on the other hand, if this boat was accidentally and not designedly burned, then there is not proof enough to create even a suspicion of guilt. Here, as I said, is the turning point of the case. Now, no eye saw

how the fire originated. The evidence is wholly circumstantial, and the conclusion must be drawn from a comparison of probabilities.

The time was shortly after midnight. The weather was the coldest ever known. The place was the middle of the river, where the water was fifty feet deep, and the distance to the shore some 300 yards. That shore, too, was a steep, bluff bank, almost perpendicular, and with no shoal water. If the tiller rope should take fire, the boat would never reach the shore. If it did reach the shore, there was no place for fastening, and she could not be stranded. If any should plunge into the river, to save themselves by swimming, they must be chilled instantly. In a word, when the fire was first discovered, the probabilities were a hundred to one, yes, a thousand to one, that not one soul would escape. Nothing but the wonderful self-possession and precaution of the pilot—first, in turning the boat to the shore when he smelt fire before he saw it; and secondly, in directing the engineer to keep one of the engines working after the boat reached the shore, in order to keep her there, when she could not be fastened, because the rope was frozen—together with the blessed escape of the tiller rope from the rapid flame—nothing but this saved one soul from perishing.

Besides, if the boat was to be burned, there was no occasion for doing it then and there, but every thing—even the horrors of suicide and murder—suicide of the three conspiring officers, and murder of all the rest, passengers and crew—against the selection of that time and place. The boat had just wooded; been locked to the shore for nearly an hour. Why not fire her then; when all the persons who might detect the act were busy on shore, and when every soul on board might escape? Why so uselessly heap up crime; murder upon arson, and both upon conspiracy? Why create the necessity of those heroic acts, by which, after the burning wreck reached the shore, the captain and mate would

have lost their lives, but for the accident of a skiff from a flat boat coming to their deliverance? Why play a game of hazard against such tremendous odds? Why not avoid gratuitous murder, which was committed if they burned the boat, and motiveless suicide, which was in the highest degree probable? We expect to satisfy you, beyond all doubt, that the burning was accidental, and that there was not even a rumor of suspicion to the contrary, until got up by the insurance companies long after.

The absence of Three of the Accused.—The government endeavors to make something out of the fact, that three of the accused are not here to stand their trial. Stephens has never been arrested, and we know not where he is. Chandler was arrested, but discharged upon the preliminary examination, and not again arrested. We know not where he is. So that neither of these can be truly said to have absconded. Nicholson, it is true, has forfeited his bail, and we know not where he is. But, as to these three, we assume these positions: First, the other defendants, who are here, are in no way responsible for their acts, any further than they are, by other evidence, connected with them; and, secondly, as a consequence of the first, they can not be expected to explain those acts. It is enough for them to be required to explain their own, or such of them as are susceptible of explanation. But acts, *in themselves innocent*, require no explanation. And as to the acts of the absent, it is enough to say, that any explanation by us is not to be expected, for want of the means of information. It would be requiring us to do the impossible.

The Presence of Nine of the Accused.—If the absence of three of the accused affords any presumption against them, then the presence of the nine affords an equally strong presumption in their favor. We expect to show you that long before their first arrest they were apprised of the suspicions whispered against them, and might have fled without involving

bail. That Holland, hearing of the arrest of others, gave notice where he might be found and arrested. That Adams Chapin, Rufus Chapin, and Kimball, never were arrested, but voluntarily surrendered themselves. That all the nine, except Kissane, have been on bail ever since, and he remained on bail until reasons not connected with this case, recently deprived him of this privilege. Yet these nine, with the most ample opportunities for escape, are all here to meet the gravest charge ever preferred against men. And because they are here, under these circumstances, we claim for them the benefit of the very strong presumption thus created in their favor. For, unless conscious of innocence, why are they here ?

Combinations against them.—We expect to satisfy you that the merit of standing trial, although conscious of innocence, is greatly enhanced by two considerations.

In the first place, a large and influential portion of the press—not all, for there have been some noble exceptions—has, from the first hour of arrest up to this hour, pursued them with a malignity and pertinacity wholly unexampled—piling up surmise upon surmise, rumor upon rumor, and falsehood upon falsehood, day after day, and month after month, until a *public opinion* has been manufactured which might well appal the stoutest heart. That this persecution has followed them into this very court-house, and poured forth its venom upon court and counsel, for the sole reason that in order to secure a *fair trial*, these poisoned influences were excluded from this room ; yet these men thus hunted down and pre-condemned, are, nevertheless, here.

In the second place, there is a combination back of these newspapers, not a whit less, but even still more formidable—a conspiracy among numerous corporations, wielding millions of capital, and reaching all over the Union, to procure the conviction of these men—some of them too poor to pay either counsel or witnesses ; in pursuance of which conspir-

acy, venal newspapers have been subsidized, and agents of all sorts from respectable down to base and basest, hired at large expense to effect their purpose. Yet, these men, *who might have been elsewhere*, have dared to defy this tremendous moneyed power, exerting itself through these most formidable agencies. Why have they not long ere this placed themselves where no *extradition treaty* could reach them?—as, indeed, the District Attorney, at the last term, predicted they would—and said that nothing short of Omnipotence could keep them here, if out on bail. Yet these men are here!

Suing the Insurance Companies.—Much stress appears to be laid on the fact that, in every instance where the insurance money has not been paid, suit has been brought. We expect to satisfy you that this is a circumstance wholly in our favor—that it is precisely the course which honest men would and do take. Had they refrained from prosecuting when payment was refused, and the reason stated, viz; the intentional burning of the boat, it would have looked as if they feared to face an investigation. But, by commencing suits, and thus defying the insurance companies, they have either exhibited a foolhardiness which is inexplicable, or a consciousness of innocence which is irresistible. No one can doubt that if these claims had been *given up*, this prosecution would never have been *gotten up*. This is manifest from what transpired at the meeting of the underwriters, as testified by Choate. All they wanted was to avoid payment. Public justice was nothing to them then, and they even now say they have been opposed to this prosecution.

Conduct of the Defendants.—The general character of the defendants has not been put in issue, and is not therefore a subject of comment. But their previous position in society, and their conduct generally, from the time when the conspiracy is alleged to have been formed, up to the present moment, are in issue, and are fair subjects of proof and com-

ment ; and in this connection I desire to call your attention to several points.

Most of them are heads of families, occupying respectable positions, and for whom they reputably provide,—and have wives and children who love and depend upon them.

Most of them have been engaged in regular business, which they have pursued attentively and industriously, until they came to meet you here.

In their transaction of business, connected with the lading of this boat, there are some matters which the government thinks suspicious ; but so do not I. For instance, Kissane, without any disguise of handwriting, or otherwise, filled up some of Cole's invoices, he being better acquainted with such transactions, and having made sales to Cole. So Cole used Filley & Chapin's blanks, after his purchase, striking out their names, and inserting his.

In like manner, some of Smith & Kissane's blank bills of lading were used on this boat for other persons, by striking out their names, and inserting others. Now, these things are precisely what conspirators, watchful to cover up every track, would not have done ; and yet precisely what innocent men, thinking no evil, and therefore taking no precaution, would be very likely to do. And the same remark applies generally to the perfect openness and apparent unconsciousness which characterize all their conduct.

It is to be remembered, that from a period not definitely fixed, but certainly anterior to the purchase of the boat, according to the hypothesis of government, each of these defendants had become the depository of a guilty secret—a horrid and horrible secret—one which the human heart was never made to hold—which would struggle for utterance continually—through every word, and look, and act, and if the possessor were one instant off his guard, must and would betray him ; and yet, although by the most wonderful *retrospection* ever brought to bear upon the past, the behavior of

these men during that awful period has been scrutinized, as it were, with an universal eye, not one word, or look, or act, has been discovered which indicates the hiding of so tremendous a secret. Think of this, gentlemen, more especially after the boat had started—could those who were left behind, in dread suspense, sleep as usual, eat as usual, or work, or talk, or act, as usual? It is not possible. The good God never made his creatures to be capable of such *seeming*.

But this is not all. The boat was burned, many of the insurances paid, and then suspicions were excited. At first they were only *whispered* in the secret conclave of the underwriters. To that they were to be confined, and the conduct of the suspected most carefully and secretly watched. But there was one noble-hearted man—himself afterwards most treacherously charged, and then discharged—I mean Capt. Choate—who demanded an open proceeding by arrest, or he would make known the secret charge. The open proceeding was declined, and he did make known the accusation and machinations of this conclave of underwriters, of which one Mason was the most prominent actor. The first result was that Cummings chastised him. This would be the *first* impulse of an innocent, but the *last* of a guilty man. If the accusation was false, the verdict of every manly heart would be, "*served him right.*" Most innocent men would *right* such a *wrong* in some way or other. They chose this way. But I am not here to defend the charge of assault and battery. However much Mason was battered, *he* has his remedy elsewhere. What I wish you to observe is, that from the moment of the first promulgation of suspicion—nay, from the moment it came to be secretly entertained, down to this moment—the conduct of these men has been watched with more than the eyes of Argus—not by *retrospection*, as before, but by direct and most concentrated *vision*.

And yet I aver that since that time, and down to this, there is not one look, or word, or act, of any of the defendants here

on trial, which is not consistent with perfect innocence. If there be, you will be able to put your finger on it. But I am entirely confident that their behavior will stand the severest scrutiny. They have not behaved like guilty men, and do not now behave so. I am satisfied that you must have expected to meet a very different sort of men, when you came to try so grave a charge.

General Aspect of the Evidence.—I think, gentlemen, that you must have been disappointed, as I certainly have been, in the *kind of evidence* upon which you are asked to find a verdict of conviction. The learned counsel has repeatedly said in your hearing that the evidence would “*grow up*” as the case progressed. I presume he meant as “*tall oaks from little acorns grow.*” We have had enough of the little acorns to plant a forest, but I can not see one of the tall oaks. It seems to me that the spirit and vigor of the attack have not at all come up to the lofty phrase of the manifesto.

Considering the long time for preparation, the vast expenditure of money and labor to get up the case, and the consummate ability of all sorts employed, to say nothing of some of the means—I say, considering all these things, it would not be unreasonable to expect some very clear and definite proof, both of the *actual formation* of the conspiracy to burn the boat, and of the *actual burning* of the boat *by design*, in pursuance of such conspiracy. For this conspiracy, as charged, is a very distinct and definite thing. It must have had a subject, object, and intent,—a beginning, middle, and end. Some one must have first suggested it to some other one, and he to another, and so on, until all were *initiated* as conspirators.

There must have been a time, place, and manner of doing all this. And there must have been some momentous details to be arranged—as how many and who were to be let into the perilous secret. Should passengers be received for

gratuitous murder? Should cargo be taken on board for gratuitous destruction? To what extent should useless supplies be taken, or useless insurances be effected? When and where should the boat be burned, and who should apply the torch? All of these and many more details entered into the idea of this conspiracy, if there was one.

And yet there is not a single item in this vast account as to which you have any definite proof. You can not say with whom, or when, or where the conspiracy originated, or how it was formed, or how it was to be executed. All is vague, shadowy, and uncertain. Instead of that clear light by which you might see the truth unmistakably, you are asked to grope along, through mist and fog, and feel your way from fact to fact, until you get through this "mighty maze," without a plan.

You are asked to construe negative testimony into positive—possibilities into certainties—proof of what men could do, into proof of what they did—to supply from imagination what is wanting in the testimony—in short, to convict these men upon private suspicion and public clamor, all got up and fomented by interested corporations—bodies politic and corporate, but without souls.

Are you prepared for this? I trust not, and I think the evidence now to be introduced will make clear the innocence of the defendants.

The witnesses for the defense were then examined in the following order :

Isaac Cough—Was the partner of Capt. Choate. He was asleep on the starboard side, in the front room. Looked over the larboard side when waked by the ringing of the bell and stamping of Capt. Choate, and saw the fire breaking up near the chimney. Went down on the derrick to the lower deck, where he found the hands in great confusion. Capt. Cummings was without a coat, exerting himself to the utmost to rescue the passengers. The cold was intense.

Mr. Williams—Was on board the *Martha Washington* in 1848 and 1849 as Mate. The boat was apt to take fire. It was on fire fifteen or twenty times while witness was Mate. The boat was liable to take fire on the larboard side from the chimney. Witness never knew a boat sink from overloading. The fires spoken of by witness generally took place from the chimney on the larboard side of the boat, the same where the fire occurred when the boat was burnt. The boat will carry 650 tons.

On being cross-examined, the witness stated that in the last up-river trip of the boat, she took fire three times in one day, from the same chimney. This was on the Mississippi river under the command of Capt. Irwin. Never knew fire to take place on the starboard side from the chimney.

Andrew Wilson—Witness has been on the river since 1841. Has been a Mate on other boats. The *Martha Washington* will carry 700 tons.

Jesse Campbell—Has been on the river ten or twelve years. The steamboat *Charles Hammond* is the same size as the *Martha Washington*. The *Charles Hammond* can carry 700 tons. After her guards are reached by the water, the *Charles Hammond* could carry 150 tons. Witness says it is a common occurrence for boats to take fire from the chimney. The *Daniel Webster* took fire from chimney, and thirty persons on board of her were lost.

The witness was at the place where the boat was burnt. It was a most unfavorable place for landing. The banks were high and steep—in some places almost perpendicular.

John Bergamire—Witness was assistant engineer on board the *Martha Washington*. Was on her two months before as third engineer. Saw candle boxes piled up on deck on both sides—extended back to wash house on the larboard side. While fires were being made at the wharf in Cincinnati saw persons engaged in carrying sole leather on board the boat. The witness thinks from seventy-five to one hundred

rolls were taken in, noticed or observed by him. Witness don't remember that he ever saw a boat more heavily loaded than the Martha Washington. Was sleeping in the second room; was awakened by the cry of fire; saw fire on the larboard side; went down to the lower deck on the starboard side; jumped from the bow to reach the log in the river, which extended to the shore; did not reach it and fell into the river; the boat was some twenty or thirty feet from the shore; swam to the shore.

The witness was cross-examined as to the sole leather. Did not count the rolls; estimated them.

Mr. Painter—The Martha Washington would carry 650 tons and upwards. Twenty tons in addition would have little effect. Witness has been a mate; says the mate directs the loading to be put on board. Fires on boats are common; generally from the chimney. The Charles Hammond will carry rather more freight than the Martha Washington.

C. E. Nourse—In December, 1851, the stock of Filley & Chapin was large; three rooms fifty or sixty feet deep; contained boxes filled with boots and shoes. The Chapins owned, as they said, \$40,000 or \$50,000 worth of stock. Witness advanced them money at different times. They owed witness between two and three thousand dollars. They paid him in March, 1852. Witness did not look into the boxes—they were piled upon each other. Chaney made the arrangement for loans, after Cole's purchase.

Mr. Titus—From the 26th December to the 6th of January, 1852, witness was through the houses of Chapins. Made an estimate of the stock at from \$20,000 to \$25,000. Witness had several conversations with Burton. He said he thought they would fail. Said they had sold their stock to Cole. They had stock in the second and third stories.

James F. Painter—Was mate on the Martha Washington four or five months. Has seen the boat take fire around the chimney outside the casing; also from below. The Martha

Washington could carry 650 tons; might carry more, but can't tell. Witness was never on a boat which was not liable to take fire. Tin cased the chimney, but it cracked in 1850, so that one could see on the bulkhead.

John Lynch—Was on the Martha Washington under Capt. Cummings as bar keeper. Is now employed on one of the Lake Erie boats. There were piled up in the social hall of the Martha Washington, boxes, rolls of paper, and brooms. The witness slept next door to the office. When he awoke the social hall was on fire. Witness knows Brown, owner of the America, on which boat witness is engaged on Lake Erie. Never told Brown he believed the boat was set on fire, nor that he could do the defendants no good. Never heard any suspicion expressed, about the time of the fire, that the boat had been set on fire.

Wm. Grady—Lives at St. Louis. Followed the river five or six years. He was pantryman on board the Martha Washington. Saw sole leather carried down about dark, before the boat left the wharf at Cincinnati. The leather was put down the hole. Boxes were piled up in and outside the social hall; paper bundles were laid on them, and brooms were laid on the paper. There was plenty of provisions on board for the trip to New Orleans. The boat was loaded within six inches of the guards. When witness first heard the bell he saw the blaze through the green slats near the chimney, extending to the social hall. These slats were on a false door on the larboard side, near the chimney. The witness says the blaze was through the slats, but the paper was not then on fire. Witness saw sheep skins piled up nearly to the roof. Saw delivered to the boat, at Cincinnati, three or four dray loads of white sole leather.

J. C. Waller—Witness lives near Louisville, Ky. Went down the river as a passenger on board the Martha Washington, on business, to St. Joseph. He slept on the second berth of the gangway; went to bed about eleven o'clock.

Heard the bell ringing, and stamping on the deck, and a cry of fire. The boat was very heavily loaded—passengers complained of it.

John Snethen—Witness is a farmer. Was four years on the river, and was fireman on the Martha Washington the last trip. Witness saw leather brought on board at Cincinnati, in the afternoon and after night.

When the alarm of fire was given witness went forward. Saw the fire at the chimney on the larboard side. He took the cable on shore; jumped to a log and fastened the cable to a tree. The boat was loaded very deep. Heard no suspicions that the boat had been set on fire.

On cross-examination, witness was inquired of whether he had been with Clark, the attorney. Witness said he had been twice to see Kissane, but had not been with Clark. He saw white sole leather on board; was piled pretty nearly over all the freight. Sheep skins were stowed on deck, and in the hold. Hands sat upon the sheep skins—some of the firemen ate there.

Mr. McLaughlin—Witness helped load the boat; was hired for that purpose the 6th or 7th of January. Large quantities of candle boxes were brought on board, and also large quantities of leather in rolls—some of these rolls were put in the engine room, more in the hold. One hundred bales of sheep skins, more or less, were brought on board. The hands were loading the boat until eleven o'clock at night.

On cross-examination, witness said white sole leather was put on board at Cincinnati.

Robert Lemon—In 1851 witness was employed by Filley & Chapin. The hands made a week from 100 to 150 pairs of boots; never less than from 70 to 75. The usual amount of sole leather on hand was from one to three thousand sides—kept in the second and third stories of the building occupied by them. In the stores the leather was kept in the cellar. They had an unusual quantity of calf skins. They had the

largest stock he ever saw. The witness has been at Cincinnati four years. There were on hand twenty-five or more bales of sheep skins, and as much more stored. This witness prepared for the shipment, early in January, 1852, 200 cases of boots. The hands were busy in preparing the shipments. Remembers that the 200 cases of boots were let down from the second story of the building. Two persons nailed the boxes. Twenty-five rolls of sole leather were also let down. There was a much larger quantity in the cellar of the store. There were twenty-five or thirty bales of sheep skins at the factory. After the shipment there was very little of the stock left. There was nothing left in the Main street store.

Mr. Chaney carries on the same business. One half the sole leather was white, or, at least, there was that proportion of white sole leather.

On cross-examination, the witness says the sheep skins were brought down the river about the same time. Saw a man marking the boxes which contained the boots. Lyman Cole bought out the establishment about the middle of December.

Benjamin Earl—The witness has lived in Cincinnati nine years. Was the salesman of Filley & Chapin a year, and up to the sale to Cole. The firm owed witness five or six thousand dollars. To secure this sum the Madison policy was assigned to witness. Witness believes that by the sale to Cole, and the shipment, they intended to cheat their creditors. Witness having borrowed, on his own credit, \$1,200 from Kissane, for Filley & Chapin, and to secure the payment, he assigned to Kissane, on the above policy, \$1,500. When the loan was made it was to be returned in a few days.

Filley & Chapin had borrowed money from Cole, and the sale was made to him to pay the borrowed money. Burton never went with witness through the rooms of the factory or

other buildings occupied by the Chapins, and if Burton went through the rooms it must have been after the sale to Cole. The Chapins had rising of twelve hundred sides of sole leather. They dealt largely in sheep skins. The shipments were made by the Chapins to get the money into their pockets. Kissane got boots from the company. The books of the firm were not kept as the witness would have kept them.

Soon after Cole took possession, bought great quantities of sole leather, white and red. He remembers fifty bales were bought at once, which was the largest purchase at one time. Burton left the 182 dozen of sheep skins—took notes, which he was to protect, if skins should not be sold. Ninety-eight cases of boots the greatest number sent to the store in one week. There were employed in the establishment from 150 to 175 hands. Two hundred rolls of white sole leather (by drayman's certificate) and 1600 dozen sheep skins were sent on board the Martha Washington. Ninety odd cases of boots and shoes were sent. Fifty cases were directed to Horace Cole, California. Two hundred boxes of boots were shipped for Adams Chapin from the factory. Witness did some of the marking on the above boxes on the sidewalk. Of the boxes letter C was marked shipped to Brownsville, Texas. A variety of hats, shoes, boots, &c., above seventy cases.

Burton told witness that they (the Chapins) had offered him six or eight thousand dollars. Said he could get the money if he had the bills of purchase. Burton came into the store and said he had Filley's dying confession; that he would fix them. Witness replied that it was as false as hell; not one word stated by him (Burton) was true. Burton then said he was only waiting a telegraph to fix the irons on him. Witness (to use his words) told him that he was a damned old scoundrel, and observed to him, have me arrested. Witness then said he should do his duty, regardless of threats;

that if the Chapins were guilty they ought to be arrested; and the witness further said he hoped if the boat was purposely burnt, the guilty persons would be punished.

Afterward the witness went to the Dennison House with Burton. On their way he proposed if the witness would come out and show fraud he should have \$2,500. Burton offered to secure him \$2,000, and said he would set him up in business. That Carpenter would take him into partnership.

On being cross-examined, whether he had not said to Dr. Case that he could send the Chapins to the penitentiary, witness replied that he could not say whether he had said so or not. He was also asked whether he had not said to the same person that the defendants had shipped to ———, of Texas, articles of no value. Witness replied he had not said so, and explained that articles had been sent to Texas which were not saleable in Cincinnati, and which had been purchased by Chapin in New York, and which were saleable in Texas, particularly low quartered shoes for women, &c. Cole said he would sell on time.

In regard to Stephens' purchase, witness says he became acquainted with him, and shortly afterwards he inquired for a room in which to deposit stores. Had no room. Stephens purchased between two and three thousand dollars worth. His boxes were marked G. P. S.; not positive there was an S.; directed to the care, the witness thinks, of some one in New Orleans; cases weighed about fifty pounds each.

Cooley's shipment—witness says Cooley was not at Cincinnati at the time of the shipment.

Horace Cole's shipment—brother of L. Cole, defendant: 200 bales of white sole leather were shipped. The leather was principally taken from the cellar under the store. The cellar was dark—the leather could not be seen except by candles.

Sixteen hundred dozen sheep skins were shipped. Sold the red sole leather at Louisville. Three drays were loaded

six or eight times with sole leather. The principal part of the sole leather was sent on the 7th of January, 1852. The sole leather was piled up in the cellar under the store, extending two sides and several rolls in depth. The assignment of the Madison Insurance office was dated back some twelve or twenty days.

The sales of white sole leather were weighed. Some of it in the second and third stories of the factory, the other part in the cellar of the store. This he stated on cross-examination. Also, he said he never knew Filley & Chapin to purchase sole leather which was not in rolls, except leather brought to the factory or bought in the city. The marks on the boxes the witness has described as nearly as he can.

J. S. Oliver—Was in the employ of the Chapins. They had one hundred and fifty hands, and made between seventy-five to eighty cases of boots weekly, each case containing one dozen boots.

In the cellar of the store, on the left hand as one entered, the white sole leather was laid five or six rolls high, and extended thirty feet. This was the cellar of the Main street store. Ladies' shoes were in boxes in the second story. In the third story there were hats. The witness speaks of the last of December, 1851, and the first of January succeeding. In the first story of the store there were boxes of boots and shoes. The store was about sixty feet deep; five or six boxes high extended round the room, 120 feet inside the elbow. The boxes contained boots and shoes.

About the time of the shipment saw the hands lowering sheep skins from the store.

On cross-examination, witness said he had been at the jail a number of times. When the shipment was being made, witness carried a message from Cole to Kissane, about shipping pork and lard that day on the Martha Washington.

George Burris—Witness is a ship carpenter. On the 14th of January, 1852, was on a flat-boat near where the Martha

Washington was burnt. This was near the foot of bend Sixty-five, on the Mississippi. Came near with the flat-boat while the Martha Washington was on fire; jumped into a skiff, and rowed round the boat. The wind blew from the Arkansas shore. The bow of the boat had been at the shore, but was floating out into the river. The flames caused witness to row off. Saw seven or eight men—some of them jumped into the yawl, and appeared to be greatly excited. Witness saw Capt. Cummings trying to climb up to the stern. Witness asked him to get into the skiff, which, after some time, he did, and witness took him to the shore.

Mr. Conine—Knew Capt. Cummings. Saw him on the Rio Grande. He was doing business as a merchant, and had a respectable establishment.

Capt. Kendrick—The Martha Washington was worth \$10,000. The trip down worth at least \$4,800.

Mr. Bruck—Purchased, at Cincinnati, flour, corn meal, and bread, amounting to at least \$36.

John Henry—Lives eight miles from Cincinnati. Was fireman on board the Martha Washington. There were many boxes on board; white sole leather—does not remember the quantity of white sole leather. Witness helped load the boat: there was a large amount of sole leather; great numbers of boxes. Witness speaks of the burning as other witnesses. He fell into the river. Capt. Cummings pulled off his coat and gave it to him. Capt. Cummings went on board anxious to save some children that were on board.

Col. Austen—Knew Capt. Cummings in Mexico, selling goods. Saw him frequently.

Charles Smith—Also knew Capt. Cummings in Mexico—engaged in selling goods.

Mr. Huhlt—Witness lives in Newport, Ky. Engaged in freighting. The Martha Washington would carry from 650 to 700 tons. She was apt to take fire from her chimney.

Witness has seen a boat loaded so deep that a current ran across her.

Letters from New Bedford read, recommending the shipment of pork and lard to that place, dated 3d Dec., 1851.

John Myers—Shipped 125,400 cigars for California, the 7th January, 1852, on board the Martha Washington.

Andrew Lytle—Witness has been on the river since 1846. The Martha Washington will carry 650 tons, and 150 tons might be put on her after her guards touch the water. When the chimney becomes red hot the fire may be communicated to the bulkhead, through the case which surrounds the chimney.

Mrs. Thayer—Is sister to the Chapins. She left Massachusetts and arrived at Cincinnati on the 9th of January, 1852, with the intention to go down to New Orleans with Capt. Cummings, her brother-in-law. But the boat having left Cincinnati on the 8th, she did not go.

Mr. Kebler—Cole called, with Filley & Chapin, on the witness. The company were desirous to assign certain merchandize, a schedule of which was presented. Witness wrote a bill of sale, and filled up notes for the purchase money, after deducting between six and seven thousand dollars, the whole amount being eighteen thousand dollars. Cole came to the office and requested witness and Judge Walker, who practice in partnership, to garnishee Stephens' insurance. An attachment was issued, and the insurance company was garnisheed for the debt due by Stephens to Cole, for goods purchased from Cole. Some time after Burton came to the office to see paid the money on the insurance at New York by Kimball, and it was suggested that \$8,000 be paid on that policy. Burton was anxious to get an assignment of the policy, so that he might obtain the money. Kimball refused to make the assignment. Burton sought evidence to show the fairness of the shipment. After Kimball refused to as-

sign the policy, Burton said he did not believe the goods were shipped.

Witness spoke often to Burton afterward respecting the matter; the shipment was made on the 8th. Burton said he arrived on the 9th, and was at Chapins' store and saw no such property as is alleged to have been shipped.

Cole made insurance at a Detroit office, with the agent at Cincinnati. The agent would not settle unless an adjustment should be made. The assured were determined to prosecute. Suit was commenced on the policy; has been continued and not pressed. The branch of the office has been withdrawn from Cincinnati.

Mr. Scarborough requested to see the books of the firm and papers. Witness offered the books which he declined. Afterward he called for the books, which witness refused to produce. White sole leather they got, as witness understood, down the river and from the canal, by exchanging made-up articles, &c. The witness stated the number of notes given by Cole on the purchase, and the notes being produced he identified them.

James Riley—The witness is second mate. The Martha Washington and the Charles Hammond are about the same size. The Charles Hammond carries seven hundred and twenty or twenty-three tons.

Lieut. Moore—Capt. Cummings was engaged in the merchandizing on the Rio Grande.

Wm. Trumper—Saw Nicholson at the Walnut St. House. He was treated as a gentleman.

Mr. Defray—In 1852 was at the Walnut Street House. Saw nothing peculiar in Capt. Cummings, Nicholson and Kissane.

Mr. Duffler—Bought 1849 gallons of brandy, 13 casks for Kissane, to be paid for in candles, for which witness received five per cent. At Smith & Kissane's candle factory there were made daily one hundred boxes of candles.

Mr. Meader—Lives in Cincinnati. Is a creditor of Filley & Chapin. A person from Kentucky represented he had a large quantity of white sole leather to sell. The man said he would ship it to New York if he could not sell it in Cincinnati. Witness directed him to Chapins, but does not know whether he called, nor whether they purchased his leather.

Witness saw on the floor above the cellar many boxes. The weather was cold the latter part of December, so that the river was closed. Witness supposed the goods on hand amounted to between twenty and twenty-five thousand dollars.

Mr. Cliff—Was drayman on the 7th of January. Hauled six or seven boxes of cigars, and brandy to the Martha Washington, from Kissane's factory. Also candle boxes and lard in barrels. He was engaged in hauling as much as four days. At the same time two other drays were employed in the same business. Twelve hundred boxes of candles were hauled from the same place to the Martha Washington, and 13 casks of brandy.

F. Gilgress—Lives in Cincinnati. Is a drayman. Hauled one cask of brandy; also two other casks to the Martha Washington. This was about dark on the 7th of January. Hauled boxes for Filley & Chapin—fourteen, perhaps more. Knew another person that hauled boxes of candles. Hauled also from pork house to the Martha Washington. Three or four other draymen were also hauling lard oil, &c., and candle boxes for Kissane to the Martha Washington.

John S. Powers—The witness was flour inspector in Cincinnati in the fall of 1849. He knew Horace Cole. Was one of the deputy sheriffs at San Francisco. Has a strong likeness to his brother, Lyman Cole. Witness was acquainted with Perkins, firm Perkins & Ingart. Witness returned from California July 7th, 1851.

Kissane told witness he was desirous of shipping goods to

California to his old friend Perkins. Witness advised him to ship boots of a certain kind, called Hungarian boots, and shoes. This was in the fall of 1851 and January, 1852. About new year the river opened. From the 5th to the 7th of that month noticed a large amount of shipping going on. Lard and pork and candle boxes. Understood from the defendants that they were shipping by the Martha Washington lard oil in addition to the above. Witness saw half a dozen drays at Kissane's pork house, and also the same number at the candle factory.

Boots sold in California at \$48 per pair. Kissane shipped 300 bbls. mess pork, 600 boxes of candles, and 600 boxes again of do. Witness saw the bill now in evidence torn from the book. It contains 13 casks of brandy, 6 boxes of cigars, 155 boxes of boots, &c. The above were shipped to California.

Letter handed by Kissane to Lawrence, introducing Capt. Cummings to Smith & Kissane.

After the boat was burnt heard Kissane regreted it very much, as if his goods had gone to California he would have done well.

A. M. Holman—In 1851 witness was employed by Filley & Chapin, and afterward was employed by Chaney. He took to Lexington a large number of boots and shoes, and sold them. He was never on board the Martha Washington. Witness swore to certain papers, does not now know what.

John Arnet—In 1851-2 witness worked in Kissane's candle factory. From 75 to 100 boxes of candles were made a day. Lard oil and red oil were also manufactured. Remembers the Martha Washington was burnt. There was shipped from 1,000 to 1,200 boxes of candles, 400 or 500 barrels of oil. Seventy-five barrels of oil made a day. Three hundred sheep skins in one tank. Had four tanks. Sometimes they killed two thousand hogs a day; at other times two or three hundred. The witness says there were shipped from Kis-

sane's establishment 1200 boxes of candles, 400 or 500 bbls. of lard, 200 bbls. of lard oil, about new year's.

Charles Matthews—Is a teacher in Cincinnati. By accurate measurement the Charles Hammond will carry 796 tons.

Philip Patt—Witness worked for Smith & Kissane. In the early part of January, 1852, candles were shipped. Nailed up the boxes, but can not state the number of them.

John Owens—Is a drayman. Nine drays engaged with witness. Three hundred boxes of candles; witness got the tickets. This was late in the evening (near supper time) on the 7th of January, when the boxes were delivered on board the Martha Washington.

Wm. Mowry—Is a plasterer. The first week in January, 1852, met Anderson, a drayman, hauling boxes and barrels, several days. There were engaged with him ten or fifteen drays. Anderson said they were hauling for Kissane to the Martha Washington.

This was objected to as the mere statement of Anderson.

The court admitted the evidence as competent; was a part of the res gesta, when the work was being done, and when there could have been no motive to misrepresent.

John Arthur—Lives in Cincinnati. Kept two drays four or five days engaged in hauling to the Martha Washington from the different pork houses. Eight or nine drays went down the last load to the Martha Washington. This was in the evening.

James Burns—Lives in Cincinnati. Was draying for Thos. Anderson. Hauled from the candle factory. Kissane had fifteen or twenty drays. Three or four loads, perhaps more.

Daniel Sheets—Is a drayman. Hauled 5th of January from candle factory, one load of lard oil.

Patrick Crow—Is a drayman. Hauled lard from Smith & Kissane's steam house. Oil one load. Three or four others.

Thomas Bradley—Is a drayman. Hauled one load same time with Crow from Kissane's steam house.

Martin Reese—Drayman. Hauled for Anderson to the Martha Washington from Kissane's factory.

Henry Neiter—Is a cooper. Made for Kissane & Smith five or six hundred pork barrels the latter part of December, 1851.

Patrick Keeley—Worked in Smith & Kissane's pork house in January, 1852. Many barrels of pork were shipped.

William Kirkpatrick—Good pork was packed at Smith & Kissane's pork house.

Smith Anderson—From fifteen to thirty drays were employed in hauling for Smith & Kissane articles for shipment in the fore part of January.

A. C. Cooper—Lives in New Harmony, at Mt. Vernon, Ia. Hailed the Martha Washington as she descended the river, when she came to. Witness wanted to freight twenty-five tons and upwards. The boat was heavily loaded ; water run on the lower deck. Capt Cummings hesitated whether he would take any more loading. Went on the upper deck, returned and said he would take it. Went some miles below and took on board 1000 bags of corn. Was the last loading taken on board.

After midnight on the morning of the 14th of January, while in his berth, witness heard the bell ringing violently. Sprang out of his berth, ran into the ladies' cabin, met the chambermaid, who appeared to be stupefied, and said nothing. Saw Holland, the mate, immediately after, who was knocking at the doors of the cabin and crying fire at the bow. Witness returned to his berth, snatched up a part of his clothes, retreated to the starboard side, got on the lower deck, and saw the blaze in the social hall. The fire seemed to run through the boat as lightning. Witness saw the boat was nearing the shore. He stood on the lower deck and was the first or among the first to jump to the shore. He ran up

some distance on the land as he was apprehensive that gunpowder was on board. He returned to the fire. Capt. Cummings was there, without a coat, raising his hands and exclaiming, O Lord, where are the children? He was greatly affected.

Moses Parmely—In January, 1852, was engaged in draying. Saw Anderson's drays delivering pork, lard and lard oil. A great deal of loading was on the wharf near to and opposite the Martha Washington.

E. J. Wood—Witness knows Anderson was draying for Smith & Kissane. He employed a great number of drays on an emergency.

Samuel Bebee—Draying in Cincinnati. Draymen exchange works in cases of emergency. Witness hauled four loads from the factory of Kissane to the Martha Washington shortly after the river broke up.

Thomas Anderson—Followed draying in 1852. The principal house he drayed for was the house of Smith & Kissane, and McGill. He hauled twelve hundred boxes of candles from the candle factory to the Martha Washington. He had some eleven or twelve drays under his direction. Hauled two hundred barrels and tierces of lard, also three hundred bbls. and tierces in addition, two hundred and fifty bbls. of pork, from the pork house. Six or seven days drays were engaged in hauling. Three hundred bbls. of pork were at first directed to be hauled to the Statesman steamboat. It refused to take more freight. The witness was then directed to haul the same to the Martha Washington. Fourteen casks of brandy, 250 bbls. of pork for Cole were hauled. Saw the boxes, &c., at the Martha Washington, being loaded. Also, there was hauled to the same boat, 300 bbls. of beef, in doing which witness was not employed.

Henry Chapin—In January, 1852, witness went to the 4th story, with his uncle, Rufus Chapin, where he saw ten or fifteen bales of sheep skins let down, which were sent on board

the Martha Washington. There were no other skins at that time in fourth story. Witness knew other skins had been there and had been removed.

Mr. Powers—Has made a strict calculation of the measurement of the freight on board the Martha Washington, which amounted to 720 tons ; and he has measured the capacity of the boat, according to the most approved rules of measurement, and he finds that the boat could carry from 30 to 50 tons more than was on board of her.

Mr. Riddle—Stated that a short time after this case was heard by the commissioner, before whom Burton was sworn as a witness, and who testified that he had received no compensation and expected none for his efforts in relation to this prosecution, Burton said to witness, in a conversation, afterward, that he did not expect to lose a dime. Witness understood him to say that he expected to be saved from expense by the insurance offices.

Mr. Brown—Several packages of sheep skins being brought into court, the witness stated that No. 1, 9 lbs., 16 dozen in a bale, which would weigh 144 lbs., and which multiplied by 100, would make 14,400 lbs., being 7 tons.

Rebutting evidence was called by the prosecution.

Dr. Kates—Lives in Cincinnati. Is acquainted with B. Earl. He frequently said to witness that the Chapins were all concerned, and that he could send them to the penitentiary, and would do so. The witness was asked by a juror as to Earl's general character for truth, and he answered that he had never told him a falsehood.

B. Earl—Being called and examined in relation to the statement made to the above witness, states that he had borrowed money from Dr Case for Filley & Chapin—some two hundred dollars. The witness was engaged to be married to a lady in the east, and was obliged to postpone it, because he could not get money from Filley & Chapin which they owed him. That at this disappointment he was displeased

and disappointed, and if he made the threat against the Chapins, as stated by Dr. Kates, it was in reference to the conveyance of their property to defraud their creditors, which he supposed was punishable. Witness had been in the practice of borrowing money for the firm.

Mr. *Barnum*—Being called by the prosecution, was asked in relation to Burton's general character for truth and veracity.

The defendants' counsel objected to this evidence on the ground that the general character of the witness had not been assailed.

By the prosecution it was insisted that general character for truth may be given in evidence, where proof has been given of contradictory statements made by a witness.

The court admitted the evidence.

The witness stated that he knew nothing against the truth of Mr. Burton, and would believe him under oath.

To the same import were the statements of Mr. Hughes, Mr. Powell, and Mr. Paine, all of whom are acquainted with the witness, and some of them live in his neighborhood.

Several of the defendants' witnesses, when called, were asked by the prosecution whether they had been examined by Clark, and their testimony taken down and signed by them. These questions were objected to by defendants' counsel. They avowed the fact that Clark, being one of the counsel of the defendants, had been requested to ascertain the facts within the knowledge of the respective witnesses, in order that they might be classified, and called so as to produce to the court and jury a connected relation of the facts. And they alleged that the counsel concerned in court, from the great number of witnesses, could not ascertain the necessary facts so as to examine them intelligibly. And they insisted on the right, as professional men, to understand from the witnesses to what points they could testify.

The prosecution alleged that it was training the witnesses, and would necessarily influence them favorably for the defendants.

The court directed Clark to be called, and being sworn, he stated that being a member of the bar, and employed as counsel for the defendants, he had taken down the statements of facts to which they would testify, from several of the witnesses, which they had signed, and which statements he had given to the defendants' counsel, in order that they might know how to call them for examination. He further stated that he had asked the witnesses no leading questions to influence their statements, but had put down on paper what they said voluntarily. That in two or three instances these statements had been taken down in the presence of two or three other witnesses.

The court remarked that they could not control the intercourse between the defendants' counsel and their witnesses, unless they have been guilty of unprofessional conduct. That they supposed it was not improper in counsel to ascertain from the witnesses, facts, especially in a case like the present, where hundreds of witnesses were in attendance, that they might shorten the examination by calling the witnesses who had a knowledge of the same facts. The witnesses, or at least many of them, had been examined before the commissioner originally, their testimony taken down and published in a book, which is in the hands of both parties.

The court further observed, that under the circumstances of the present case, they would direct the counsel, Clark, not to take down the statements of the witnesses, and no further statements were taken, known to the court, except a short one by one of the counsel engaged in court, which was presented or offered to be handed to the opposing counsel, but was waived by them, no objection being stated.

The testimony being closed, the counsel for the prosecution asked the court to suspend further proceeding in the case

until the arrival of rebutting witnesses, which they expected from Cincinnati. That they had requested the witnesses by telegraph to come, and they were expected. This was about twelve o'clock, the usual time for adjourning the court, and the court observed that they could not suspend the proceedings in the case on account of the absent witnesses.

And they stated that public notice had been given, in open court, before the adjournment of the court the day before, that the defendants would close their testimony by twelve o'clock the ensuing day, which afforded ample time to bring the witnesses. That one train of cars, after the notice, on the same evening, passed down to Cincinnati from Columbus, and that two trains of cars had arrived that morning from Cincinnati, in either of which the desired witnesses might have come. That no other train would arrive until after dark, and that as the witnesses had not come in the morning trains, it was not certain that they would be up in the evening.

That three weeks had been taken up in the examination of the witnesses, and that the cause could not be suspended under the circumstances.

Other objections might have been added, as a reason why the case should not be delayed. If the witnesses were summoned and were paid by the government, unless their absence was with the consent of the prosecution, a motion for an attachment should have been made, on which the court would, as a matter of course, delay the cause and send for the witnesses. The witnesses were not absent with the consent or knowledge of the court, but if the prosecution permitted them to be absent, they were not liable to an attachment, as they were not absent in contempt of the process of the court.

Before the examination of the witnesses for the defendants commenced, on their being called to be sworn, it was distinctly announced in open court, by one of the counsel for

the defendants, that only such of the witnesses would be examined as were most important; and that they were called and sworn that their per diem might be allowed them. And on the same day, before a witness was examined for the defendants, the leading counsel for the defense, in the presence of the presiding judge, observed to the leading counsel for the prosecution, that they would not take up more than a week, as they should examine only their important witnesses. And during the recess of the court, at twelve o'clock, the day before the testimony closed, in conversation with the presiding judge, in the presence of the leading counsel for the prosecution, the counsel for the defendants observed that they would close the testimony by twelve o'clock the next day. This is admitted by the leading counsel. The witnesses were telegraphed, but failed to come. There was time to have brought the witnesses more than three times the distance of Cincinnati.

There was no intimation made to the court on the part of the prosecution, that the rebutting evidence was material in the case, nor to what facts or persons it could apply. Nor was there any suggestion of surprise by any of the facts proved. There would seem to be no ground for such a suggestion, as the testimony of all the principal witnesses had been written down before the commissioner and published, and during the trial was in the hands of the counsel on both sides. These circumstances, connected with the extraordinary effort and ability with which the cause had been prosecuted by the counsel who represent the government, induces the court to believe that the evidence referred to could not be deemed important.

But, in addition to all these considerations, no court, except under very peculiar circumstances, could permit the proceedings to be suspended. If the prosecution is to be indulged to send for witnesses, after the close of the testimony, the defendants could claim the same privilege, and

this would extend the investigation for any length of time the parties might desire. No such rule has been recognized by any court.

At the meeting of the court in the afternoon, Mr. Morton, the District Attorney, commenced his opening argument, and continued it that afternoon and the following day. After the close of his argument, Mr. Ewing, in the defense, made known to the court, that they would submit the cause to the jury, without argument, on the charge of the court.

Mr. Stanbery, on the part of the prosecution, stated to the court the submission was altogether on the part of the defense; for the prosecution they desired to argue the case.

The court observed that they regretted the course, in this respect, of the counsel in the defense. That the court could not control the counsel in the discharge of their duties to their clients. But when no argument has been made in the defense, and the prosecution, by the District Attorney, has had a full opening, commenting at large on the testimony, which occupied the court a day and a half, further argument on that side could not be heard. The court said that they would charge the jury the next morning.

Judge McLean charged the jury as follows :

Gentlemen of the Jury : The indictment in this case is found under the 23d section of the act of the third of March, 1825. It provides, " That, if any person or persons shall, on the high seas, or within the United States, willfully and corruptly conspire, combine and confederate, with any other person or persons, such other person or persons being either within or without the United States, to cast away, burn, or otherwise destroy, any ship or vessel, or procure the same to be done, with intent to injure any person or body politic, that hath underwritten or shall thereafterward underwrite, any policy of insurance thereon, or of goods on board thereof, or with intent to injure any person or body politic that hath lent or advanced, or thereafter shall lend or advance, any money on

such vessel, on bottomry or respondentia, or shall within the United States, build or fit out, or aid in building or fitting out any ship or vessel, with intent that the same shall be cast away, burnt, or destroyed, for the purpose or with the design aforesaid, every person so offending shall, on conviction thereof, be deemed guilty of felony, and shall be punished by fine, not exceeding ten thousand dollars, and by imprisonment and confinement to hard labor, not exceeding ten years."

The defendants are charged with having wilfully and corruptly conspired to burn and destroy the steamboat Martha Washington and her cargo, with the intention to injure certain underwriters who had insured the same.

Two or more of the defendants must be found guilty, or the conspiracy charged will not be established. To consummate the offense, under the statute, it is not necessary to prove that the boat was burnt, or that the insurance offices were injured. It is enough to show that the defendants conspired to destroy the steamboat, with the view of injuring those offices.

A conspiracy is rarely, if ever, proved by positive testimony. When a crime of high magnitude is about to be perpetrated by a combination of individuals, they do not act openly, but covertly and secretly. The purpose formed is known only to those who enter into it. Unless one of the original conspirators betray his companions and give evidence against them, their guilt can be proved only by circumstantial evidence. This kind of evidence often satisfies a jury of the guilt of the accused. But in such a case the circumstances must be so strong as to be inconsistent with the innocence of the accused. It is said by some writers on evidence, that such circumstances are stronger than positive proof. A witness swearing positively, it is said, may misapprehend the facts or swear falsely, but that circumstances can not lie.

The common design is the essence of the charge; and this may be made to appear, when the defendants steadily pur-

sue the same object, whether acting separately or together, by common or different means, all leading to the same unlawful result. And where *prima facie* evidence has been given of a combination, the acts or confessions of one are evidence against all. This rule of evidence is founded upon principles which apply to agencies and partnerships. And it is reasonable that where a body of men assume the attribute of individuality, whether for commercial business or the commission of a crime, that the association should be bound by the acts of one of its members, in carrying out the design.

To sustain the prosecution the conspiracy must be proved, and that it was entered into to injure the underwriters. This it is insisted has been done.

1. By evidence showing *prima facie*, that the defendants being known to each other and associated in this enterprise, formed the combination as charged.

2. By using false bills of lading and invoices.

3. By obtaining insurances thereon.

4. By representing a greater amount of tonnage on board the Martha Washington than its capacity could carry.

5. By burning the vessel.

That the defendants have endeavored to recover the insurance money, is not controverted, nor that the boat has been burnt. The destruction of the boat is not punishable under the act of Congress, but if it appear from the evidence that it was destroyed by the defendants, or by one who had combined with them, it is strong, if not conclusive proof of a conspiracy to do so.

So if it appear that the bills of lading were false, it shows a combination to injure the underwriters. Stephens, Nicholson and Chandler are included in the indictment, but they are not parties to this proceeding; still, if they entered into the conspiracy with the defendants their acts and confessions while carrying it out are evidence in this case.

It appears from the evidence of Robert McGrew, who keeps a boarding house on Seventh street, in Cincinnati, between Main and Walnut, that Stephens, Holland, and one Edwards, boarded with him—that Cole, Capt. Cummings and Kissane called to see them occasionally; and from their conversations it appeared that they became acquainted with each other on the Rio Grande. That Cole and Holland had been engaged in running a boat on that river. They had no private conversations to the knowledge of the witness, but appeared to be ordinary visitors, sitting in the public room.

In the winter of 1851, William Northrup, who lives in Cincinnati, saw Kissane, Cummings, Cole and Nicholson frequently together. Mr. Penniman saw Nicholson in the fall of 1851, at Maysville, who said he was on his way to the Esculapian Springs, in Kentucky, to visit his family, before he left on the Martha Washington, which boat he had purchased. Other witnesses proved that the defendants above named associated with each other, and that they were intimate with the Chapins.

Mr. McGregor sold to Capt. Cummings the steamboat Martha Washington, which was owned by the witness and the Messrs. Irwin, for \$9,000, which sum Capt. Cummings was to pay on her return trip.

The insurances charged to have been made on false bills of lading and invoices, will now be stated with the evidence applicable to the same.

Wm. Kimball, of New York, insured in the Union Mutual Insurance Company, of the city of New York, \$5,200 on leather, and \$4,800 on sheep skins. This insurance covered two hundred rolls of white sole leather, and sixteen hundred dozen of sheep skins, which it is alleged were transferred to him by Filley & Chapin, in December, 1851.

In the same month Lyman Cole is alleged to have purchased from the same firm boots and shoes, amounting to the sum of \$18,000. The consideration is represented to

have been borrowed money in part, and for the residue notes were given, which are in proof.

Cole claims to have shipped two hundred and fifty barrels of mess pork, two hundred tierces of lard, ninety-seven cases of boots to Cooley, fifty-four cases of boots to Horace Cole.

Adams Chapin claims to have shipped two hundred cases of boots.

Several witnesses have been examined to show that Filley & Chapin, or Cole, their assignee, had not the articles in their store stated in these bills of lading.

Mr. Burton, a witness, states that on the 3d December, 1851, he sold to Filley & Chapin one hundred and sixty dozen sheep skins, and deposited with them one hundred and eighty two dozen. He returned home and shortly after one of the Chapins called on him at his residence and wanted him to assist in procuring the discount of a note for six hundred dollars. He also wanted to purchase white sole leather. Witness went with him to a large leather dealer, but he would not sell to him on the terms offered. Nor could the witness procure a discount of the note.

Witness went to Cincinnati about Christmas. Made application for the skins he had deposited. Cole was then in possession of the property and refused to give up the sheep skins. Filley, Burton and Earl, the witness says, made an estimate of the property on hand, which amounted to eight thousand five hundred dollars.

Chaney, the brother-in-law of Chapin, purchased the stock on hand, and carried on the business, to some extent, in which Filley & Chapin had been engaged. Witness told the Chapins, that the number of sheep skins stated had never been shipped. The witness received letters from Filley & Chapin requesting him to send them sheep skins. When he sold to the firm one hundred and sixty dozen sheep skins, and deposited the one hundred and eighty-two dozen, the firm gave him a note for his accommodation, to be secured by the

skins deposited. The Chapins informed the witness that they had not purchased fifty dozen of sheep skins except from him. In the year 1849-50, witness purchased twenty-nine hundred dozen of sheep skins. In the year 1850 he sent to New Orleans fifty hundred dozen.

Mr. Taylor, a witness, is the largest manufacturer of leather in the city of Cincinnati. The white sole leather is more valuable than the red. In the winter of 1851-2 white sole leather was scarce and in demand. Had no idea that there was in the city two hundred rolls. He also deals in sheep skins, and had no knowledge of sixteen hundred dozen being in the city.

Several other witnesses were acquainted with Filley & Chapin, had been in their stores and manufactory, and had seen little or no white sole leather, and not many bales of sheep skins.

Benjamin Earl, a witness for the defendants, was salesman for Filley & Chapin, up to the time of the sale to Cole. Burton never went with witness through the rooms of the boot and shoe factory, or of the stores. If he passed through the rooms it must have been after the shipment. The firm had rising of twelve hundred sides of leather in 1851. They dealt largely in sheep skins. Soon after Cole took possession, great quantities of sole leather, white and red, were purchased. The largest purchase made at once, within his recollection, was fifty rolls. The firm of Filley & Chapin employed from one hundred and fifty to one hundred and seventy-five hands.

The witness prepared the articles for shipment, and he says that he forwarded to the Martha Washington, on drays, two hundred rolls of white sole leather, and sixteen hundred dozen of sheep skins, shipped to New York in the name of Kimball. The witness thinks that this shipment to New York, and the sale to Cole, were designed to place the property of Filley & Chapin beyond the reach of their creditors; they having failed in business. The witness shipped on

board the Martha Washington about one hundred and fifty pairs of Hungarian boots for Kissane.

The witness also states that he shipped to Horace Cole, in California, at the instance of Lyman Cole, fifty cases of boots and shoes; ninety odd cases he shipped to Cooley; on Red River. Two hundred boxes of boots were shipped from the factory by Adams Chapin.

To Stephens, of Brownsville, in Texas, Cole shipped a variety of hats, shoes, &c., about seventy cases. These shipments were all made under the superintendence of the witness, who saw the boxes and other articles, a part of which he marked. He did not see the articles delivered on board the Martha Washington, but he has no doubt they were delivered, from the dray tickets which were returned to him.

He says that the white sole leather was principally deposited in the cellar under the store, which was dark, and could only be seen by candle light. It was piled up, about five rolls deep, against the wall, on the left hand in entering the cellar, and extended some thirty feet or more. Other rolls were in the factory, and other places. A great number of bales of sheep skins were in the same cellar. Other bales were in the factory building.

The witness states that from seventy-five to near one hundred cases of boots were made in the factory weekly, each case containing one dozen pairs. The largest number that was made and sent to the store in one week, amounted to ninety-eight cases.

Earl having borrowed twelve hundred dollars of Kissane, for Filley & Chapin, he assigned to Kissane in full payment, fifteen hundred dollars on the Madison insurance, which Adams Chapin had assigned to him for that purpose.

This witness has been impeached by the testimony of Dr. Kates, who says he has been for several years acquainted with Earl. His intercourse with the family of the witness was almost daily. Several times the witness loaned money

to Earl, on his responsibility, for the benefit, as witness supposed, of Filley & Chapin. Witness wanted the money and requested Earl to pay it. He complained that Filley & Chapin owed him at the time of the failure \$——. He said he could send the Chapins to the penitentiary, and would do so if they did not pay him.

Dr. Kates also says that Earl informed him that he had put a case or cases of articles that were worth little, and forwarded them to Texas, &c.

On his examination in chief, Earl being questioned as regards this conversation with Dr. Kates, says that if he stated that he could send the Chapins to the penitentiary, he was under excitement, and spoke with reference to the conveyance of their property to defeat the claims of their creditors. He stated that he was disappointed in not being able to go eastward, on a matrimonial engagement, which, for want of funds, he was obliged to postpone.

In regard to the case or cases of articles sent to Texas, he referred to the articles being unfashionable in Cincinnati, and consequently unsaleable. They consisted of Hungarian boots and low quartered shoes for ladies, which were not worn in Cincinnati, but which were good articles and saleable in Texas.

Dr. Kates, on being asked by a juror, what was the character of Earl, answered it was good—that he had never told him a lie.

Robert Lemon was employed by Filley & Chapin as foreman in the factory. The usual quantity of sides of sole leather was from one thousand to three thousand sides, kept in the second and third stories of the building. At the stores such leather was kept in the cellar. They had the largest stock the witness ever saw. He prepared for shipment two hundred cases of boots, each case containing a dozen pairs. After the shipment there was but a small amount of stock

left. Cole's purchase was made about the middle of December.

Smith & Kissane claim to have shipped on board the *Martha Washington* twelve hundred boxes of candles, three hundred barrels of pork, one hundred and fifty-five cases of California boots, ten hundred and forty-nine gallons of brandy, and two hundred barrels of lard oil.

Witnesses have been examined to prove that these articles were shipped on the *Martha Washington*. Mr. Cliff says that he hauled, with several other draymen, for Smith & Kissane, candle boxes and barrels of lard. He was engaged, as he thinks, four days. He believes twelve hundred boxes of candles were hauled to the above steamboat on and before the 7th of January, 1852. He also states six casks of brandy were hauled to the boat, at another time six casks, and one another, making thirteen casks.

F. Kilguss was also engaged in the above service as drayman—he hauled one cask of brandy to the boat. Also, he hauled thirty-three boxes of candles for Kissane & Smith. He also hauled from the pork house lard oil; from the factory candle boxes—there were three or four other drays engaged at the same time.

John Arnet, a drayman, says there were shipped from one thousand to twelve hundred boxes of candles, four or five barrels of lard, two hundred barrels of lard oil to the steamboat. Several other draymen corroborate the above statements. Thomas Anderson, a drayman, who did the hauling for Smith & Kissane, and employed other drays when his own could not do the work required. He states that from the candle factory of Smith & Kissane, twelve hundred boxes of candles were hauled to the *Martha Washington*. Also, two hundred barrels of lard oil. From the steam house two hundred barrels and tierces of lard, one hundred of which were shipped by Cole to Lee, Boston; and one hundred to Taber,

New Bedford. Two hundred and fifty barrels of pork belonging to Cole, and in addition, three hundred barrels of pork which the draymen were directed to take to the Statesman boat, but as that boat could not receive them, its cargo being completed, they were taken to the Martha Washington.

He also states that fourteen casks of brandy were hauled for Smith & Kissane from Ward's, a liquor dealer, to the Martha Washington. He saw the above articles on the wharf opposite the Martha Washington, and hands were engaged loading them. This was in the evening.

The above articles are similar to those claimed by Smith & Kissane to have been shipped on board the Martha Washington. And also two hundred and fifty barrels of pork, included in the shipment of Cole. Also, one hundred tierces of lard, and about one hundred and fifty cases of Hungarian boots, and six boxes of cigars. This, with the evidence before given, purports to cover the entire shipments of Cole and Kissane, also of Kimball and Adams Chapin. And about seventy cases of shoes and boots to Stephens, thirteen barrels of brandy were sold by Cotteral, a witness, to Stephens, in exchange for stoves. This leaves six boxes of merchandize unaccounted for, which were said to contain ladies' cloaks, but there is no evidence where they were purchased, or as to their value.

Nicholson's insurance covered his liquors for the use of the bar and two boxes of merchandise. The bar is stated to have been well supplied with liquors. Of what the two boxes of merchandise consisted no account is given. Chandler's shipment of two boxes of merchandize, but the contents of the boxes are not known. Chandler was discharged by the commissioner, but he was included in the indictment. Neither Chandler, Nicholson nor Stephens are before the court, and it may be owing to that circumstance that the articles shipped by them, or at least a part of them, are not in evidence.

Mr. Powers, a witness, states that after his return from California, in the summer of 1851, he recommended Kissane to ship to California Hungarian boots, and other articles, to Perkins & Engard, who were personally known to Kissane. Boots, the witness said, were selling there at \$48 a pair.

The shipments made below Louisville are important only in regard to the capacity of the boat to carry the amount of freight stated.

It appears that insurances were effected on the above shipments—by Stephens for \$10,702 04; by Capt. Cummings on the boat \$4,500, and to cover freight \$2,500, making the sum of \$7,000; by Kimball, \$10,000; by Lyman Cole, \$5,458; by Kissane, \$8,000; by Chapin, \$4,200; by Nicholson, \$1,200.

If these insurances were made on false invoices or bills of lading, it would afford conclusive evidence that the intention was to injure the underwriters. And it would authorize a presumption against the defendants, that they had done any thing necessary to be done to effectuate their object. And if the insurance was greatly beyond the probable value of the articles shipped, at the place of consignment, it would be ground on which the fairness of the transaction might well be questioned.

By the bills of lading, and other evidence, does it appear that there was a greater amount of tonnage on the boat than its capacity could carry? This is assumed as proved by the prosecution, and on this ground it is contended that there was fraud in the shipment.

Witnesses differ as to the amount of tonnage the Martha Washington could carry. Mr. Powers, by measurement, ascertained that the cargo amounted to seven hundred and twenty tons. And it appears from the mathematical calculation of Mr. Matthews, that the Martha Washington could carry, in addition to that amount of freight, more than thirty tons. When the Martha Washington left the wharf at Cin-

cinnati, the tops of her guards were from six to eight inches above the water line. After her freight was all on board, the water, as some of the witnesses state, was over her railing at midships. It will be for you, gentlemen, to consider and determine, from the evidence, the fact as to the amount of freight.

It will be for you to determine, gentlemen, whether the Martha Washington was burnt accidentally or by design. This is a most important inquiry in the case. As before remarked, the burning is not necessary to establish the conspiracy charged, but if the fact be proved, that it was burnt by design, and by one of the defendants in this case, or by one clearly shown to be concerned in the incipient stages of the transaction, it will be very strong, and perhaps, conclusive evidence to establish the conspiracy charged. If the shipment was *bona fide*, yet if the conspiracy was to burn the boat, with the view to charge the underwriters, the defendants are guilty.

The offence charged is of the highest criminality. It not only tends to destroy all confidence in commercial transactions, but in carrying out the intention, it must often involve the destruction of human life.

Lewis Choate was pilot of the Martha Washington. He was on watch at the time the fire occurred. The boat had wooded a short time before, and while thus engaged, the evening being intensely cold, he was in the social hall warming himself; he resumed his place as soon as the boat was ready to move. Capt. Cummings came up, stood in front of the pilot-house, but soon turned and came into the pilot-house. After running five or six miles the witness smelt paint burning, and so stated to Capt. Cummings, who ran down fronting the pilot-house, looking over, said the witness was mistaken. Witness said he was not mistaken. Capt. Cummings then ran down to the cabin deck. Holland, the mate, was on the hurricane deck, said the wood was very dry, and that

he would go down. Witness then rang the bell violently, and stamped. In a very short time after smelling the fire, a minute or two, the smoke appeared, and fire. Heard no noise in the social hall. Nicholson, the clerk, said that he was sitting in the hall, his boots off, asleep. Did not know of the fire till witness gave the alarm. When he awakened the passengers, the fire was bursting some of the windows. The boat was about 300 yards from the shore when witness first saw the flames. He thinks no effort could have extinguished the fire. The boat was thrown to the land by the action of the starboard wheel in a few moments, and the passengers on deck jumped to the shore. One of them fell in the water, Capt. Cummings pulled off his coat and gave it to him. He and the mate were seen in the yawl at the boat, aft the wheel, where a passenger was standing on the guard, the fire around him. He was forced into the yawl, which moved toward the stern of the boat, when Capt. Cummings and the mate were seen on the guard, endeavoring to ascend into the ladies' cabin. Holland, with the aid of Cummings, got on the upper deck, and was forcing open the doors of the ladies' cabin. The smoke and fire filled the cabin.

The yawl, shortly after it was left by the captain and mate, pushed off. The two persons in it, from excitement or alarm, could not manage it; and it floated down the river. The boat not being fastened at the bow, floated a considerable distance from the shore. Such was the progress of the flames, that the mate and captain must have been destroyed in a few minutes, if a skiff, which belonged to a flat boat, had not taken them from the burning wreck. The captain was often besought by persons on the shore to get into the skiff and save himself, but he seemed to be so determined to rescue some children on board, that he paid no attention to his personal safety, until the fire forced him to get into the skiff. So intensely cold was the weather, that no one could swim more than a few feet. When the captain came to the

shore he was frenzied by excitement, and was constantly raising his hands and exclaiming, O ! Lord ! where are the children ?

The fire was first seen in the social hall, on the larboard side, opposite the chimney. There was there deposited a number of candle-boxes, and on them bundles of brown paper, and on them bundles of brooms were laid. Opposite the chimney there was the appearance of a door, the upper part of which was made of painted Venetian blinds.

The cabin of the Martha Washington was taken from the Era. It was old, and had been frequently painted. Around the chimney there was a case of tin or sheet-iron to prevent the heat of the chimney from setting the boat on fire. Several of the witnesses say, that the boat was liable to take fire from the larboard chimney. That on its trip up the river a short time before, it had taken fire from the chimney three times in one day. One of the witnesses, who had been employed on board of the boat, had known her to be on fire nearly fifty times. Another witness says when he saw the fire first, the flames were seen in the slats of the false door.

Nicholson, from his own confession, was in the social hall when the fire broke out, asleep, and was wakened by the bell. Seeing the fire, he awakened the passengers.

As to the burning of the boat there is no positive evidence ; and in such a case, unless circumstances raised a probability of guilt, the jury may well inquire into the motive of Nicholson or of some other individual, to do the act. Admit that he owned half the boat, and had an insurance that would cover the liquors in his bar, and two boxes of merchandise, still his interest would not lead him to burn the boat. It was insured for only one-half of the sum paid for it, so that his loss would greatly exceed the amount of his insurance. Men are seldom, if ever, prompted to commit a crime, except from motives of gain or revenge.

There are a great many circumstances connected with this case, which have been brought to bear upon it, and which may have no direct relation to its merits. The clerk of Kissane, who now states that he swore, without objection on his part, to a bill of lading, not knowing that the articles had been shipped, affords no evidence of intentional fraud, if the proof be clear that the articles were shipped.

The copy of a letter of Kissane, charged to have been taken surreptitiously from the papers of the District Attorney, is in evidence. Some testimony has been given as to the abstraction of that letter, but as the act of taking it as charged is an indictable offense, you cannot in this case convict him of the act. The court permitted the evidence to show the motive, with which the letter must have been taken.

There can be no doubt, from the history of this case, the defendants were acquainted with each other, and that in the purchase of the boat, and in the shipment of the cargo from Cincinnati, they were engaged in the commercial enterprise. Their shipments were made, as appears, not for the benefit of the whole, but for the benefit of the shippers individually, as stated in the bills of lading. But, notwithstanding this individuality of ownership, if they united in a conspiracy to burn the boat, in order to charge the underwriters, they are guilty under the act of Congress.

But in this, as in all other cases, guilt cannot be inferred by vague surmises arising from acts which had not a direct tendency to form the conspiracy or carry it out. If the jury shall be satisfied from the evidence that shipments were made according to the bills of lading and invoices furnished, the injury to the underwriters can only arise from the conspiracy to burn the boat.

It is the province of the jury, and not of the court, to decide on the credibility of witnesses. Earl, who is the principal witness, so far as the Chapins and Cole are concerned, is

a man, as the jury must have perceived, of intelligence He being the salesman of the house of Filley & Chapin, had a much better opportunity of knowing the facts stated by him than any other witness. He is unimpeached, except by Dr. Kates, which is explained by Earl in his evidence in chief. Mr. Burton and he differ in the fact, that an estimate was made of the stock on hand by them, and another individual. The discrepancy between these witnesses may be explained without an impeachment of either, if the principal view of the stock by Mr. Burton was after the shipment, or if he did not enter the dark cellar, where the white sole leather, as stated by Earl, was stored. Mr. Kepler, a witness, says, that Burton came to Cincinnati on the 5th of January, the day after the shipment was made.

You will examine, gentlemen, and weigh the evidence, and decide this great case, under the law, as your judgment shall sanction.

I know of no higher function which a citizen can be called to discharge, than to sit in judgment on his fellow-creatures. It should remind us all of that day when we shall be judged. In the discharge of a duty so awful, how careful should we be to examine ourselves and see that no lurking prepossession or prejudice should influence our judgment. We know the case only as it has appeared to us on this trial. Whatever may have been said in regard to it elsewhere, is unfit to be considered here. Even those sympathies so honorable to our natures, are not to influence us here. Nothing but the facts and the law, should govern you. You will not convict, if you have reasonable doubts. But if such doubts have no place in your judgment, your verdict will be against the defendants, or such of them as you may find guilty.

The jury, before they retired, requested to have, in their retirement, the charge of the court. The counsel having no objection, the court handed the charge to the jury, but afterward withdrew it, that it might be printed for the use of the

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jury. The printed copy, corrected by the judge, was handed to the jury the same evening.

The jury, after being absent a considerable time, including the Sabbath, returned into court, with a verdict of not guilty.

SAMUEL E. FOOTE v. MORGAN LINCK AND THE TRUSTEES OF
THE LIFE INSURANCE AND TRUST COMPANY.

An injunction was granted against the collection of a tax from The Trust Company, alleged to be unconstitutional.

This was done, on the application of a stockholder, a citizen of Connecticut, who filed a bill against the Auditor of State, and the Trust Company.

In such a case, the parties being before the court, it can give the same relief, as if the trustees of the company were complainants.

The court will give relief to parties on the record, as their respective rights may require.

A suit at law is not necessary to authorize the injunction, where the mischief complained of, would be irremediable at law.

The allegations of the bill were admitted by the demurrer.

Messrs. *Worthington* and *Stanbery* for plaintiffs.

Attorney General *Pugh* for defendants.

OPINION OF THE COURT.

During the late term a bill was filed by the complainant, a citizen of Connecticut, against the defendants, in which was set out the charter of the Trust Company, showing that there was a provision in it declaring, that the capital stock should be taxed no higher than the stock of other banks of the State. Also, that a proposition being made by the legislature to the banks of the State, if they should cease to circulate notes of a less denomination than five dollars, they should not be taxed more than at the rate of 5 per cent. on their dividends.

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That the Trust Company Bank accepted the proposition, called in its small notes, and filed the evidence of the fact in the Auditor's office, as required by the act ; and that for many years the tax was on the dividends as proposed ; that by a late law the tax was imposed more than ten times greater than the tax before assessed on the capital of the company ; that under the law for the collection of such tax on banks, the auditor was required to appoint a commissioner for the collection of such tax, to whom he issued his warrant as the law authorizes, requiring him to make a demand of the tax, which, if not paid in five days, the commissioner is authorized to enter the bank by force, open its vault, and take therefrom the amount of the tax and penalties, in gold and silver, &c.

The tax demanded by the commissioner under the above act for the years 1851 and 1852; with the penalties thereon, amounting to the sum of ninety-six thousand dollars, to which was to be added five per cent. for poundage to the commissioner, and an additional penalty of five per cent.

The complainant alleges that he holds fifty shares of stock in said company, which is now at par or above it ; that the said law impairs the obligations of the contracts before stated, and is consequently void under the constitution of the United States ; that he has applied to the trustees of the bank, who have taken no step to arrest the collection of the tax above stated ; and represents that if the money shall be collected and paid over to the State treasury, the injury to himself and the bank will be irremediable, and he prays an injunction against the Commissioner, the Auditor of State, and the Trustees of the company.

Notice having been given to the commissioner, that an application would be made to the Circuit Court at its late term, at Columbus, for an injunction, which application being made, in pursuance of the notice, there being no opposition, the Circuit Court, on the face of the bill, ordered the injunction to

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issue, but, at the same time, the court said, a motion would be heard to dissolve the injunction during the term. A motion to dissolve being made, it was agreed that it should be argued before the Circuit judge, at Cincinnati, at Chambers.

On the 18th day of November, at Cincinnati, the above motion came up for argument. And it was argued by the Attorney General for the State, Mr. Pugh, in favor of the motion, and by Messrs. Worthington and Stanbery for the complainants.

The Attorney General distinguished this case from that of the *Bank of the United States v. Osborne*. The tax in that case was one hundred thousand dollars, when the whole amount of the capital in both the branches of the United States Bank, in this State, amounted only to the sum of one hundred and fifty thousand dollars. The tax, therefore, was said by the Supreme Court, would be destructive of the branch of the bank in Ohio. And this was one of the grounds on which the opinion of the Supreme Court was founded. It was also an interference with one of the fiscal agents of the government, and was not within the taxing power of the State. It was also objected that all the directors were not made parties.

The Attorney General mainly contended, that the complainant, as a stockholder, could not sue the directors; that the bill was filed for himself, and not in behalf of others; that it might be the wish of the trustees to pay the tax; that the bill asked the court to take the power from the trustees, as given to them by the charter, which would, in effect, wind up the concerns of the bank, and a number of authorities were cited as sustaining the positions taken.

The Attorney General also contended that the tax was not ruinous to the bank, and that if the money were collected, provision was made for the re-payment of it, should the law under which it was assessed, be decided by the Supreme Court of the United States, to be unconstitutional.

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The above is a very general statement of the argument of Mr. Pugh—nothing more than an outline of it is attempted to be given.

Mr. Worthington opposed the positions of Mr. Pugh, observing that he appeared as well for the trustees as for the complainant.

Mr. Stanbery also considered the argument of the Attorney General, and submitted his views as to the merits of the case.

It cannot be considered as any disparagement to the State court, that a citizen of another State sues in the Federal court. The constitution and the act of Congress, give him this right. In the exercise of it, he does no more than every suitor in the State court, who brings his action in one of the courts of the State, which may be a matter of choice or accident.

No reason is ever assigned by a citizen of another State, that he cannot obtain justice in the State courts. Such a suggestion would not be tolerated, and the bill would be dismissed for impertinence, if the objectionable part were not stricken out.

The complainant being a citizen of Connecticut, has a right to sue in this court, if he has made a case for the exercise of jurisdiction by the Circuit Court.

He has stated an interest in the Trust Company, which the law will protect, against the threatened injury complained of, if that injury be irremediable, and the mode of relief be within the powers of a Court of Chancery.

It does not follow that the right asserted, is hostile to the powers of the trustees, because they are made defendants. From the facts stated in the bill, it appears the right of the claimant and the relief asked, in no respect interfere with the powers of the trustees. It is true, the complainant asks that the trustees may be enjoined from paying over the tax

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to the State ; but there is enough on the face of the bill to show, that the suit of the complainant was brought to protect the rights of the Trust Company, and consequently the rights of the trustees.

That this may be done, is a familiar principle of chancery. The court will decree as between the parties on the record, whether they be complainants or defendants. The court having jurisdiction under the bill filed by the complainant, can protect the rights of the trustees, though defendants, the same as if they were complainants. And chancery often, in such a case, decrees between conflicting rights of defendants. This doctrine is laid down in both the volumes of "Story's Equity." It has been often acted upon by the Supreme Court.

In the case of *Piatt v. Oliver and Williams*, and a great many other defendants who were citizens of Ohio, and therefore could not be made complainants in the case ; but their interest was the same as that asserted by the complainant, the court gave relief to the defendants, the same as the plaintiff, according to their respective rights. This case was appealed to the Supreme Court, and the decree of the Circuit Court was affirmed. The case is reported in 203 McLean, and also in one of the volumes of Howard.

The case of *Chiles v. Boon*, reported in 10 Peters, is to the same effect. The trustees being citizens of Ohio, could not be made complainants, but being made defendants, they are before the court, and the court having jurisdiction from the citizenship of the complainant, can act upon the right, and for the protection of the parties, the same as if the trustees were complainants.

The injunction was allowed upon the face of the bill ; the demurrer now filed, admits the statements of the bill, as far as they are correctly pleaded. If no contract has been impaired, the demurrer filed raises the question for the decision of the court. That question has not been argued, and I am

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glad that it has not. The principal reliance seems to be a want of jurisdiction in the court, in the form in which the suit has been brought.

The Supreme Court of the State has decided that the tax has been imposed under a constitutional law, and that the mode of collecting it is legal. But this decision, I understand, has been taken to the Supreme Court of the United States, by a writ of error. A case thus situated, cannot be considered as one of authority, as it is still pending in the Supreme Court, and may be reversed. If the Supreme Court shall affirm the judgment of the State court, it being the same question as involved in this case, the Circuit Court will, as a matter of course, dissolve this injunction without argument. I can entertain no doubt of the jurisdiction on the points made.

It is fit that the Supreme Court should act upon this great question ; and, as it is before the court, and will be acted on in the course of two or three months, I deem it, therefore, inexpedient to dissolve the present injunction.

It has been argued that until the right be established at law, an injunction should not be granted. The Lord Chancellor,—if my memory serves me,—Eldon, once decided, so I think, in an application for an injunction on a patent right. But his Lordship was mistaken, as is shown by the action of a Court of Chancery, before and since his decision. In this country, an injunction has been usually granted against a threatened wrong, for which, if done, the law can give no adequate redress. In answer to this, it is said, a remedy by mandamus is provided for by law, where a tax is illegally assessed and collected. But it might become a question, whether the Circuit Court, under the State law, could issue the mandamus provided for ; and if it could, it would be in the power of the legislature to repeal the law giving the remedy.

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The money collected being paid over into the State Treasury, could not be recovered by suit, as the State cannot be sued. The remedy against the Auditor and the Commissioner might be attended with insurmountable difficulties. The poundage at five per cent, amounting to five thousand dollars, which the Commissioner will receive as his compensation for the service, could not be recovered from the State.

The Attorney General moved that the money be brought into court, which the Judge refused, as, in his judgment, there could be no safer depository than that of the vaults of the Trust Company. Complaint being made of the insufficiency of the security given by the complainant, the Judge observed that he supposed there could be no objection to any amount of security which, in reason, might be required; he, therefore, ordered that a bond in two hundred thousand dollars be given, conditioned to pay the whole amount of tax claimed by the State, if this bill shall be dismissed, and the injunction be dissolved. If, however, the injunction shall be dissolved, the Auditor and Commissioner may proceed in the summary mode authorized by the statute, to enter the bank and seize the money, if it shall not be paid within the five days after demanded.

The bond has been given, as required, and has been transmitted to the clerk of the Circuit Court.

WARD ET AL. v. THE OGDENSBURG.

The maritime law is rigid in its exactions of unremitting care and vigilance on the part of those entrusted with the navigation and safe keeping of vessels of every kind, to avoid accidents and injuries by collision. Any negligence, inattention, or want of skill, resulting in injury to others, will entitle the sufferer to remuneration.

A competent and vigilant look-out, stationed at the forward part of the vessel, and in a position best adapted to descry vessels approaching, at the earliest moment, is indispensable, to exempt the steamboat from blame in case of accident in the night time, while navigating waters on which it is accustomed to meet other watercrafts. The mate, who has command of the deck, is not a sufficient look-out. He must be a person who makes the look-out his exclusive business. Nor is the wheel-house a proper place to station the look-out. He should be stationed forward, where he can see without interruption.

In general, it is the duty of vessels, whether propelled by steam or wind, when meeting dead ahead, or nearly so, to port helm, and each turn to the right. But if they are approaching, with berth enough to exclude the possibility of their coming together, each pursuing its onward course, they are not required to port helm. Porting the helm, under such circumstances, may be a fault.

When steam vessels are approaching each other, and from the darkness or fog, there is the least uncertainty as to the course or position of the other, it is the duty of each instantly to check the speed, and then, if necessary, to stop, and back.

The defendants in an admiralty suit, who have suffered from a collision, and are in no fault themselves, may by a cross libel set up the damage they have sustained, and will be entitled to a decree in their favor for compensation.

The libellants can not join in this libel a demand *in rem* against the vessel, and one *in personam* against the owners. He may proceed *in rem*, or *in personam*, or successively in each way, until he has full satisfaction, but he can not blend the proceedings in one libel.

Messrs. *Lothrop, Swayne, Wade, and Newberry* for libellants.

Messrs. *Spalding, Stanbery, McNett, and Kimball* for respondents.

OPINION OF JUDGE LEAVITT.

The libellants aver substantially, that said steamboat, being of eight hundred tons burden, with passengers and freight on board, left Buffalo on the evening of the 19th of August, 1852, for Detroit, and proceeding on her voyage across the lake, by the usual and direct route, with all her signal lights burning and in good condition, about half-past two o'clock, in the morning of the 20th of August, off Long Point, on the Canada shore, was run into with great violence by the pro-

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propeller Ogdensburgh, then on her way from Cleveland to the entrance of the Welland Canal; the said steamboat being struck on her larboard side, near the forward gangway, and the guard and hull being so broken, that she filled with water, sunk, and was a total loss to the libellants. It is also averred, that at the time of said collision, the Ogdensburgh did not have lights burning and properly displayed, as required by law; and was not then steering on the usual and proper route from Cleveland to the Welland Canal; and, that on the approach of the Atlantic, though clearly visible for at least two miles, the propeller did not stop her engine, lessen her speed, alter her course, or take any other precaution to avoid a collision. It is also alleged, that the officers and crew of said steamboat, as the propeller approached, first put the helm *a-port*, and then hard *a-port*, to get out of the course of the propeller, and used every effort to prevent a collision, but that the propeller, though seeing the lights of the Atlantic at a great distance, did not port her helm, or slacken her speed, or display lawful signal lights, but was so unskillfully and improperly managed, that she was run nearly at right angles into and against the Atlantic; and that the collision resulted from the carelessness, negligence, and unskillfulness of the officers and crew of said propeller; and that the libellants have sustained damage thereby to the amount of one hundred thousand dollars.

The answer of Chamberlain & Crawford, the claimants of the Ogdensburgh, which they aver to be a propeller of three hundred and fifty-three tons burthen, sets up in substance, that she left Cleveland with a heavy freight, about twenty minutes after twelve o'clock, in the afternoon of the 19th of August, 1852, and proceeded by way of Fairport, toward Ogdensburgh, New York, the place of her destination, which was to be reached by means of the Welland Canal, in Canada; that about two o'clock, the next morning, steering her proper course, N. E. by E., for the entrance of said canal, the

wind being light from S. W., and the weather somewhat hazy, her watch on deck discovered a steamboat light, from two to three points off her starboard bow, and at the supposed distance of three miles ; that keeping on her course at a speed of about seven miles an hour, her mate ascertained that the light was fast nearing her, and gave the signal to "*slow*" the engine ; which was done, and the light still coming nearer, an order was given to *stop* ; that finding the boats were in danger of collision, the engine of the propeller was reversed, and she was *backed* ; that these orders were given with all possible dispatch, but in spite of all these precautions a collision ensued.

The answer then avers, that by reason of the Atlantic's turning from her proper course, and continuing with unabated speed fifteen miles an hour, in a direction across the bow of the propeller, she fell with all her momentum upon the propeller's stem, wrenching it out of place, and carrying her half round. It is charged, that the collision was wholly caused by the unparalleled recklessness of the persons in command of the Atlantic ; and that those navigating the propeller managed her according to the approved rules of lake navigation, and with a due regard to the safety of both vessels. It is also averred, that the propeller had all her lights burning, and displayed as required by law.

The claimants ask for a decree for the injury sustained by the propeller, as the result of the collision, and by the agreement of the parties, such a decree is to be rendered in this case, if in the judgment of the court the claimants are entitled to compensation.

It is also further agreed, that the value of the Atlantic was seventy thousand dollars, and is to be so considered by the court if it shall be adjudged that the libellants are entitled to a decree in their favor.

The matters in controversy in this case are indicated by the foregoing summary statement of the libel and answer.

A great mass of testimony, partly oral and partly in the form of depositions, has been exhibited to the court in support of the opposite claims of the parties, and as usual in investigations growing out of marine collisions, there is, in some material points, great conflict in the testimony. Without noticing the large portions of the evidence, which have no direct bearing on the points in dispute, I shall refer to that only which forms the basis of the conclusions to which I have been led.

But before noticing the facts, it will be proper to state some of the settled doctrines of the maritime law as to collisions. Lord Stowell, justly distinguished for his eminent ability as an Admiralty Judge, classifies the cases in which collisions may occur as follows :

“ In the first place a collision may happen, without blame being imputable to either party, as where the loss is occasioned by a storm, or other *vis major*. In that case the misfortune must be borne by the party on whom it happens to light; the other not being responsible to him in any degree.

“ Secondly : A misfortune of this kind may arise where both parties are to blame, where there has been want of due diligence or skill on both sides. In such case the rule of law is, that the loss must be apportioned between them, as having been occasioned by the fault of both of them.

“ Thirdly : It may happen by the conduct of the suffering party only ; and then the rule is, that the sufferer must bear his own burden.

“ Lastly : It may have been the fault of the ship which ran the other down ; and in this case, the innocent party would be entitled to an entire compensation from the other.” 2 Dodson’s Admiralty R., 83 ; Abbott on Shipping, 230, marginal paging.

It is clear, from the general phase of the present case, that it does not fall within the first classification. The disastrous collision under consideration did not happen through an

agency beyond human control. There is a fault resting somewhere ; a wrong-doer, chargeable with want of skill, or inattention to duty. The libellants insist that they are losers of their valuable steamboat and her appendages, by reason of the mismanagement of the Ogdensburgh. The respondents, on the other hand, insist, not only that they are not liable for the loss of the Atlantic, but that they are entitled to compensation for the injury sustained by them, as the result of the collision.

To make good their claim to indemnity, the libellants must show that the collision was caused by the fault of the other party, and that no censure attaches to those charged with the management and navigation of their boat. And, if the respondents would show a just ground of claim for remuneration for their loss, it must appear that they are without fault. I think there is no foundation for urging that the present is a case of mutual culpability, calling for an apportionment of the loss between both parties.

The maritime law is rigid in its exactions of unremitting care and vigilance on the part of those entrusted with the navigation and safe keeping of vessels of every kind, to avoid accidents and injuries by collision. Any negligence, inattention, or want of skill, resulting in injury to others, will entitle the sufferer to remuneration.

These are general and admitted principles, touching the rights and liabilities of parties, in cases of collision. It is now proper to inquire what is the result of their application to the facts of this case.

The facts, as exhibited in the evidence of the opposing parties, are in some essential particulars, widely variant. On the part of the libellants, the material facts proved, may be summarily stated as follows :

The steamboat Atlantic, the property of the libellants, being a first class passenger boat on Lake Erie, of the tonnage before stated, and with an engine of a thousand horse power,

navigated and managed with the usual complement of officers and hands, having on board, including passengers and crew, between five and six hundred persons, and furnished with the lamps and lights required by law, and the usages of lake navigation, left the port of Buffalo about, or a few minutes after, 9 o'clock in the evening of the 19th of August last, on her regular trip to Detroit. It seems according to the usual course of navigation by steamers between the places named, that Point au Pelee, putting out from the Canada shore, near the upper end of the lake, is the terminus of a direct line usually pursued; the course from Buffalo to that point bearing S. W. by W. This line of navigation runs within a short distance of Long Point, on the eastern extremity of which there is a light-house. This is sixty-eight or seventy miles distant from Buffalo. On the night in question, the Atlantic pursued the usual course of steamers, and came abreast of Long Point light-house about 2 o'clock. It was a star-light night, but a haze or smoke hung over the lake, extending upward from twenty-five to thirty feet, which rendered it difficult to discover objects involved in it at any considerable distance. The second mate of the boat was on watch from the time of leaving Buffalo till the collision.

It was the starboard watch, as it is called by mariners, and belonged properly to the master, who, on this occasion, does not seem to have been on deck during the entire watch. The second mate and wheelsman were joined on deck, at 12 o'clock, by a passenger, who had some experience as a navigator on the lake. According to the testimony of the three persons, after the Atlantic had proceeded about one mile beyond Long Point light, a little after two o'clock, they made a light—two white lights—which the mate took for the lights of a sailing vessel, heading southward. These witnesses agree in the statement that the steamer holding on her course S. W. by W., made the lights seen from a half to three quarters of a point over her larboard bow, indicating that the po-

sition of the approaching craft was a little south of the line of the steamer's course. The lights, when first seen, in the opinion of one of the witnesses, were about one mile distant. The steamer kept her course, under a full head of steam, at the rate of not less than fifteen miles an hour, when it was ascertained distinctly that the lights seen belonged to a propeller steering for Gravelly Bay, through which the entrance into the Welland Canal is reached. The steamer continued to approach without any diminution of her speed, until within three or four lengths of the boat from the propeller, when the order was given to the wheelsman to *port* his helm, which was almost immediately succeeded by the order to put the helm *hard a-port*. Very soon after the Atlantic's larboard side, just aft the forward gangway, came violently in contact with the propeller's bow, causing a breach in the steamer's side some seven feet in width, extending downward below the water line, and inward nearly to the middle hatch. Without stopping the engine, the order was given to head her to the shore, and after running between half a mile and a mile, such was the rapid inflow of water, that she sunk at a point where the lake is twenty-five fathoms deep.

Such is the case, very briefly stated, as presented by the witnesses for the libellants. On the part of the respondents, the witnesses produced are the master, wheelsman, first mate, clerk, engineer, and a fireman on the Ogdensburgh. In the first place it may be remarked, that they satisfactorily disprove the allegation in the libel that the propeller was not furnished with and did not display, on the night of the collision, the red and green signal lights required by statute. The boat was provided with these lights, and they were suitably displayed and lighted.

The Ogdensburgh in addition had two white globe lights on her cross-trees, together with several lesser lights. These, it is in proof, were all lighted, and in good order throughout the night on which the collision occurred.

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It appears that starting off across the lake from a point a few miles off Ashtabula, on the southern shore, the propeller was put upon her proper course, N. E. by E., for the entrance of the Welland Canal; and that, although there had been previously a slight variation from it, she was on it when the lights of the steamer were made, and continued upon it till the collision happened; that the lights of the Atlantic were first made by the propeller two and a half points over her starboard bow, and at the estimated distance of two and a half or three miles; that the mate having first taken the bearings of the light by compass, and seeing that the light opened a few points on the starboard, had ordered the wheelsman to keep on his course, and immediately thereafter, being uncertain as to the bearings of the steamer's lights, gave the order to *slow* the engine; that after watching the lights closely for a short time, the mate saw the red signal lights of the steamer, and ascertaining that she was within four or five times her length of the propeller, rung the bell to *stop* and *back* almost simultaneously; that before the order to *slow*, the propeller was running at the rate of eight miles an hour; that after the order to *slow*, and when the orders to *stop* and *back* were given, her speed had been reduced to about three miles an hour; that all the orders referred to had been promptly obeyed, and the propeller brought almost if not wholly to a stand; that the Atlantic, without either slowing or stopping, continued her course toward the propeller, heading, as the nautical phrase is, "*stem on*," that the mate seeing the collision inevitable, gave the order to starboard the helm, hoping thereby to receive only a glancing blow, but this movement produced little or no effect, as the propeller was stopped or nearly so, and of course did not obey her helm. The Atlantic thus struck the bow of the propeller, causing the breach in the steamer before noticed, and carrying away the lower part of the propeller's stem, loosing and turning the other part from its position, unfastening the ends of the planks,

and causing an opening through which the water found its way into the boat.

This synopsis of the testimony on both sides, as to the course and relative position of the boats, when the lights of each other were made, their subsequent conduct, and the facts relating to the collision, will suffice to show the material discrepancies between the witnesses on either side, and afford some intelligible landmarks for the court, in settling the rights of the parties.

It will be noticed that the essential differences between the parties consist in the opposite statements of the witnesses as to the bearings of the lines, on which the steamer and the propeller neared each other. On the hypothesis of the libellants, the lights of the propeller were first seen, in seamen's phrase, nearly *dead ahead* of the Atlantic, being less than a point over her larboard bow. Thus meeting, if the Atlantic had exercised the proper precaution of checking her speed, and porting her helm, and the propeller had failed to use the proper prudential measures, a collision being the result, the fault would be chargeable to the latter. But, on the respondents' proof, the lights of the steamer were seen two and a half points over the propeller's *starboard* bow, indicating clearly that she was on her proper course, north of the steamer's proper line of travel; and that, by improperly *porting* and *hard porting*, the steamer had been turned too far north, and carried across the propeller's bows. This latter supposition, I am obliged, as the case is presented, to adopt. I have failed to perceive any reason, why the statements of the respondents' witnesses, as to the matters in which they are in conflict with those of the libellants, should be repudiated. They are not only more numerous, but for reasons of a higher and more decisive character, better entitled to credit.

In this view, how stands the case? The propeller has done all that reason, usage, or law required. The many experienced and highly intelligent navigators, who have tes-

tified as experts, have declared as with one voice, that every precautionary measure adopted by her was sensible and judicious. She did all in her power to avoid the collision, while she omitted nothing that could have been done. True, the order given by her mate to starboard the helm just preceding the collision, was not called for; but for the reason before stated, it produced no result, and may well be designated as "an error," without being "a fault."

In coming to this conclusion, I am not unmindful that it was strenuously insisted in the argument, that by the settled usages of navigation, as also by judicial determinations, it is the duty of vessels, whether propelled by steam or wind, when meeting "dead ahead," or nearly so, to port helm, and each turn to the right. There can be no doubt of the existence of this rule, or of its obligatory nature; but it must be limited to cases in which it properly applies. The experts who were questioned on this subject, agree in stating, that if two boats or vessels are approaching in opposite directions, yet with berth enough to exclude the possibility of coming together, each pursuing their onward course, they are not required to port helm. Indeed, they agree in stating what is clearly obvious, that in the case supposed, the porting helms would tend rather to bring about, than avoid, collisions. These experts also say, that under the circumstances in which the Atlantic and the Ogdensburgh approached, the latter was not required to depart from her course, and that the Atlantic was wrong in porting her helm and diverging from her track.

It is clear then that the libellants have no claim to compensation from the owners of the Ogdensburgh, for the whole or any part of the loss sustained by them, as a result of this disastrous collision. It remains to inquire, whether a decree shall pass against the libellants for the loss suffered by respondents in the injury to the propeller.

By agreement of parties, the question whether it is competent in a proceeding by libel, where the answer, as in this case, asserts a claim against the libellants, and prays for a decree accordingly, to treat it as a cross libel, is waived; and it is stipulated that a decree may be entered for the owners of the Ogdensburgh, if in the opinion of the court, they are entitle to it, on the law and facts of the case. The right to such a decree depends clearly on the answer to the inquiry, whether their loss is attributable to the sole fault of the libellants' steamer. That the libellants are great sufferers from the collision, and have chosen to initiate this proceeding, can not deprive the owners of the propeller of their claim to compensation, if they are chargeable with no fault. They are to be viewed precisely as if they were the libellants, seeking indemnity for a loss; and, if they make out a good case, are entitled to a decree in their favor.

The inquiry is then presented, whether the facts and the law applicable to them, show a case of such exclusive culpability on the part of the Atlantic as not only to preclude her owners from any right to compensation, but to make them responsible for the injury sustained by the Ogdensburgh. This is contended for, by the respondents' counsel, on several grounds.

1. It is insisted that the Atlantic had no sufficient watch on deck during the night of the collision. The night, as already noticed, was not dark, but the haze on the lake made it difficult to distinguish objects at any considerable distance. The route of the steamer, especially in the vicinity of Long Point light, was one much frequented by vessels and steamers, passing up and down the lake, and to and from points along the southern shore, by propellers and other craft, carrying on commerce with the lower lakes through the Welland Canal. The Atlantic was a steamer of great power, and of great speed; and, on the night referred to, was the freighter of between five and six hundred human beings. These facts

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are quite sufficient to justify the conclusion, that those entrusted with her management and navigation were called upon for the exercise of the greatest watchfulness and care. It seems the only persons on deck having any rightful connection with the steamer, from the time she left Buffalo till the occurrence of the terrible collision, which sent her to the bottom of the lake, and occasioned the loss of some two hundred human lives, were the second mate and the wheelsman. As before noticed, it was the captain's watch ; and the testimony of the most experienced and reliable experts is, that under the circumstances of the case, it was wholly improper that the captain should have entrusted the care of the boat to the sole management of the second mate ; an officer in whom the higher qualifications of a navigator are not looked for, and who, in the language of a very intelligent expert, is viewed as the mere "drudge" or assistant of the captain. In point of fact, the second mate, even if his competency for the station is admitted (which is, at least, doubtful), did not keep a vigilant look-out, within the requirements of the decisions of the highest judicial tribunals of the country. He was, by his own statement, in the pilot house at the time he made the lights of the propeller, looking from one of the windows ; and did not make these lights till they were about one mile distant.

In the case of *St. John v. Paine and others*, 10 Howard's Reports, 557, it was said by Judge Nelson, in delivering the opinion of the court, that "The steamboat was in fault in not keeping at the time a proper look-out on the forward part of the deck ; and that the failure to descry the schooner at a greater distance than half a mile ahead, is attributable to this neglect. The pilot-house in the night, especially if dark and the view obscured by clouds in the distance, was not the proper place, whether the windows were up or down. The view of a look-out stationed there must necessarily be interrupted." And in the same case the court held, "That a

competent and vigilant look-out, *stationed* at the forward part of the vessel, and in a position best adapted to descry vessels approaching, at the earliest moment, is indispensable to exempt the steamboat from blame in case of accident in the night time, while navigating waters on which it is accustomed to meet other water craft." And again, the court said: "There is nothing harsh or unreasonable in this rule; and its strict observance and enforcement will be found as beneficial to the interests of the owner, as to the safety of navigation."

In the case of the propeller *Genesee Chief* v. *Fitzhugh and others*, 12 Howard's Rep. 443; 9 Western Law Journal, 391, in giving the opinion of the court, Chief Justice Taney says: "It is the duty of every steamboat traversing waters where sailing vessels are often met with, to have a trustworthy and constant look-out, besides the helmsman. It is impossible for him to steer the vessel, and keep the proper watch in his wheel house. His position is unfavorable to it, and he can not safely leave the wheel to give notice when it becomes necessary to check suddenly the speed of the boat. And whenever a collision happens with a sailing vessel, and it appears that there was no other look-out than the helmsman, or that such look-out was not stationed in a proper place, or not actively and vigilantly employed in his duty, it must be regarded as *prima facie* evidence that it was occasioned by her fault."

In a recent case of Admiralty against the steamboat Northern Indiana, a passenger boat on Lake Erie, decided by Judge Hall, of the District Court of the United States for the Northern District of New York, it was held, that the mate alone, while the officer of the deck, though in all respects competent to the duty, did not constitute a sufficient look-out, within the requirement of the decisions of the Supreme Court of the United States, referred to. The judge remarks that, "The mate was the officer of the deck, holding

the temporary command of the vessel, and liable to be continually called to the discharge of duties inconsistent with the keeping of a constant and vigilant watch, and ought not to have been relied on for that purpose."

In England, the rules prescribed by the courts in regard to look-outs, are more stringent than in the United States. A case is reported in the 2d vol. Eng. Law and Equity R. 557, in which the *Europa*, one of the Atlantic steamers, was condemned for an injury to a sailing vessel, occurring during a thick fog, on the route of steam travel between the United States and England, on the ground of the insufficiency of her look-out; when the proof was, that there was an officer stationed on the bridge, a quarter-master on the top-gallant fore-castle, another quarter-master at the con, besides one at the wheel.

I can not hesitate to say, in view of these authorities, that the *Atlantic* did not maintain a sufficient look-out, on the night of the collision.

2. In the next place it is urged, that the steamer was guilty of a great error in porting, and then hard-porting her helm, thereby running across the bow of the propeller, so as to make the collision an almost certain result. It has been before stated, that in the relative position and courses of the two vessels, and the time the lights of each were made by the other, there was no obligation on the propeller to port her helm. From the width of the berth between the two boats, if each had kept its course, there could by no possibility have been a collision. They would have passed at a distance probably not less than a mile apart. The law, therefore, requiring vessels and boats, approaching on the same or near the same line, to port their helms, as already remarked, does not apply. And it was palpably wrong in the steamer, and necessarily attended with danger, to port her helm, and diverge from her course, especially without checking her speed. The movement indicated great want

of skill and judgment in navigation. The steamer should have *given way*, as the nautical phrase is, and have passed under the stern of the propeller. (2 Robinson, Jr., p. 5.)

3. But another fault, very much insisted on by the advocates for the respondents, was the omission of the mate to check the speed of the Atlantic. There is no pretense that any order to that effect was given, or that in fact the velocity of the boat was at any time checked. This gross dereliction of duty, if the mate of the Atlantic was chargeable with no other, would, under the circumstances of this case, make the boat responsible for all the consequences which followed. It is entirely without excuse or palliation. It is proved that the boat at the time of making the propeller's lights was going forward under high steam pressure, and her rate of travel was not less than fifteen miles an hour. Her mate says, that from the haze on the lake he did not see the propeller's lights till within about a mile of her; and concluded, when first seen, they were on a sailing vessel going south. Yet, notwithstanding the difficulty of vision, and the uncertainty that existed as to the character of the craft, and the direction of her course—her lights seen, as he says, less than one point over the steamer's larboard bow—he pressed on with criminal recklessness, and without the least reduction of her dangerous speed. The numerous experts who have testified in this case, as well those called for the libellants, as for the respondents, agree in saying, it was the obvious duty of the Atlantic's mate, when the propeller's lights were first made, if, after noticing their bearing, there was the least uncertainty as to their position and motion, instantly to check the speed of the steamer, and then, if necessary, to *stop*, and *back*. They agree also in saying, if this course had been pursued, there was not a possibility that a collision could have happened. The propeller, pursuing her course N. E. by E., would have passed beyond the reach of the steamer, and the frightful calamity that took place would have been

avoided. And it is amazing that a course so plain and safe had not suggested itself to the mate. That instead of this, he should have crowded the helm hard *a-port*, and with unchecked velocity, turned the steamer almost across the path of the propeller, imports a recklessness and stupidity that argue badly for his fitness for the truly responsible position he occupied.

It was not deemed necessary to notice specially the judicial decisions, both in England and in this country, enforcing rigidly the obligations and duties of those connected with steam navigation. Many of these were presented and ably commented upon by the advocates of the respondents in the argument of this case. In addition to those noticed in the previous part of this opinion, many others were adduced, of pertinent application to this subject. Among them the following are noted: The *Europa*, 2 English Law and Equity R. 557; *Genesee Chief*, 12 Howard 443; 9 *Western Law Journal* 391; the *Rose*, 2 Robinson, Jr. 1; the *Virgil*, 2 Robinson, Jr. 201; the *James Watt*, 2 Robinson, Jr. 270; 2 *Haggard* 356; *Davies' Rep. (Maine)* 197; *Wharton's Dig.*, 1852, Sup. 388.

The general tendency of these authorities is to enforce the duty of great caution, and unremitting vigilance, on the part of those engaged in the navigation of vessels propelled by steam. The obligation of lessening the speed of steamboats, under all circumstances, where unchecked velocity may be supposed to be dangerous, is especially enjoined. And there can be no question that the preservation of human life, as well as of property, demands at this day, when there is such a disposition to sacrifice every thing to rapidity of movement, that owners and managers of steamboats should be held to a most rigid accountability.

I can not well conceive of a case, calling more urgently for the application of these principles, than the one under consideration. The calamity which has befallen the ill-fated *Atlantic*,

putting in the most imminent peril the lives of upwards of five hundred persons, and attended with the actual loss of more than two hundred, has resulted from an insane neglect of duty in not checking her rapid speed at the proper time, and a desire to make headway at all hazards. And it is certainly a somewhat singular feature of this case, that her owners, responsible morally and legally, for the misconduct and incompetency of the officers and agents, whom they had placed in charge of their boat, should ask remuneration for a loss, arising clearly from their recklessness or unskillfulness. As to the master of the Atlantic, some conclusion may be drawn in relation to his professional character and qualifications, from the fact, that although it was his watch, it does not appear that he was on deck, from the time the boat left Buffalo, till he was roused from his slumbers by the fatal collision; and afterwards was distinguished for his "masterly inactivity" in every thing but the carrying out of measures to save his own life. The second-mate, who was invested with the sole management and command of the boat, and to whom was committed the safe keeping of more than five hundred persons, was not qualified for his trust, as is apparent from the facts already noticed. In a word, it is impossible to review the incidents of that sad catastrophe, without a painful impression, that those occupying official stations on the Atlantic were grossly deficient, not only in professional skill and intelligence, but in the higher moral qualities of trustworthy navigators.

Under the belief that the foregoing views sufficiently indicate the grounds on which it is designed to place the decision of this case, I forbear to notice some other points made in the arguments. In my judgment, the libellants on the law and the facts, are not entitled to a decree, either for the whole, or any part of the value of the steamer Atlantic; and the respondents have a just claim to compensation for the injury sustained by the Ogdensburgh, arising from the faulty

management of the Atlantic. The amount of this injury, by agreement of parties, is three thousand dollars; for which sum I decree against the libellants, with costs.

In connection with this case, a preliminary question of Admiralty practice is presented by the first article of the respondents' answer, as matter exceptive to the libel, which is stated as follows :

" That the libellants have improperly joined a proceeding *in rem* against the propeller Ogdensburg, with a proceeding *in personam* against the respondents as her owners."

This point was argued fully before the hearing; and reserved for further consideration. Its decision now is no way material to these parties, as the court has decreed in favor of the respondents, on the merits. It may be desirable, however, that the views of the court on the point raised should be known, that the practice hereafter may conform to them.

After an examination of the authorities cited, in connection with Rule 15, of the rules adopted by the Supreme Court of the United States, for the practice of the Admiralty Courts of the Union, I am satisfied that the joinder in the same libel of a proceeding *in rem*, against a ship, and *in personam*, against the owner, in an action for damage by collision, is not admissible. In one case, before Judge Story, prior to the adoption of the rules of the Supreme Court, he expressed himself strongly against the propriety of such a joinder.

The case referred to is *The Citizens' Bank v. The Nantucket Steamboat Company*, 2 Story's R. 57. In the opinion delivered by Judge Story in that case, he remarks : " In the course of the argument it has been intimated that in libels of this sort, the proceeding might be properly instituted, both *in rem* against the steamboat, and *in personam* against the owner and master thereof. I ventured at that time to say, that I knew of no principle or authority, in the general juris-

prudence of courts of Admiralty, which would justify such joinder of proceedings, so very different in their nature, and character, and decretal effect. On the contrary, in this court, every proceeding of this sort has been constantly discountenanced, as irregular and improper." Again, the judge says: "In cases of collision the injured party may proceed *in rem* or *in personam*, or successively in each way, until he has full satisfaction. But, I do not understand how the proceedings can be blended in one libel."

The case referred to was before Judge Story in 1841. At the January term, 1845, the Supreme Court, in pursuance of express authority conferred by an act of Congress, prescribed the rules of Admiralty practice. Rule 15 is as follows: "In all suits for damages by collision, the libellants may proceed against the ship and master, or against the ship, or against the owner alone, or the master alone, *in personam*."

There seems to be no room for doubt as to the true construction of this rule. It is understood these Admiralty rules were drafted by Judge Story; and the rule above quoted, was designed to carry out his views of the correct practice, as very clearly stated in the foregoing extract from his opinion. The rule provides specifically how a party may be proceeded against for an injury by collision. It may be: 1. Against the ship and master. 2. Against the ship. 3. Against the owner alone. 4. Against the master alone, *in personam*. Clearly a proceeding in *in rem* against the ship, and *in personam* against the owner, not being authorized by this rule, is prohibited.

The rule quoted was thus understood and construed by the late Judge Woodbury. In 2 Woodbury and Minot's Rep. 92, in delivering the opinion of the court, he says: "The other objection is the misjoinder of the vessel and owners, in the same libel. This involves a proceeding *in personam* and *in rem*, in the same case, and contravenes the settled rules of

Admiralty proceedings." He refers to Rule 15, before cited, and also the 17th Rule, as sustaining his views.

Judge Conkling, in his work on Admiralty, vol. 2, 380, *et seq.*, after discussing the question, whether before the adoption of the rules of the Supreme Court, a proceeding *in rem* and *in personam* could be joined, holds, that the practice, if it was before allowable, is abolished by Rule 15.

I see no reason to doubt the conclusion, that at least, in suits for collision, it was the intention of the Supreme Court to direct what proceedings were admissible; and in pointing out the course which they regarded as proper, to prohibit all others.

The exception to the libel is therefore sustained, and the libellants have leave to amend.

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ACTION.

A patentee in assigning the use of a patent within a certain district, may reserve the right to sue for infringements. *Bicknell v. Todd*, 236.

But if he afterward assigns his entire right, the owner of the patent within the district may sue. *Ib.*

It would be unreasonable, under such circumstances, to call upon the patentee to prosecute. *Ib.*

ADMINISTRATOR.

An administrator or executor of another State may sue in Ohio. *Price v. Morris*, 4.

The grant of letters is a sufficient authority. *Ib.*

Where an administrator becomes a purchaser at his own sale, the sale may be set aside on motion by the parties interested. *Ib.*

A sale of real estate by an administrator to pay debts, under an order of court, after many years, will not be disturbed. *Newsom v. Wells*, 21.

ADMIRALTY IN THE DISTRICT COURT.

This court has admiralty jurisdiction over the Ohio river. *McGinnis v. Steamboat Pontiac*, 359.

When a steamboat is in actual peril, and one is requested to take charge of her as master, and save her if possible, with no stipulation as to time or wages, the fact of acting as master, not having been so before, will not deprive him of the right to claim salvage. *Ib.*

The fact of peril is to be ascertained from the circumstances surrounding the boat at the time when the salvage service commenced, and the fact of escape is not to be taken as proof that there was no peril. *Ib.*

The fact that the exertions of the salvor did not save the boat, she being saved by the particular manner in which the ice broke up, does not deprive him of the merit of a salvor, if he encountered the danger, and did all that could be done, under the circumstances. *Ib.*

There is no fixed rate of compensation. It must depend upon the particular circumstances. It may be a per centage upon the property saved, or a fixed sum to be ascertained pro rata upon the boat and cargo. In this case the latter course is adopted. *Ib.*

The maritime law is rigid in its exactions of unremitting care and vigilance on the part of those entrusted with the navigation and safe keeping of

Admiralty in the District Court. Agreement.

ADMIRALTY IN THE DISTRICT COURT—Continued.

vessels of every kind, to avoid accidents and injuries by collisions. Any negligence or want of skill, resulting in injury to others, will entitle the sufferers to remuneration. *Ward v. The Ogdensburgh*, 622.

A competent and vigilant look out, stationed at the forward part of the vessel, and in a position best adapted to descry vessels approaching, is required. *Ib.*

When steam vessels are approaching each other at night, and there is uncertainty, the vessels should slacken their speed, and sometimes stop and make back water. *Ib.*

The defendants in an admiralty suit, who have suffered from a collision, and are in no fault themselves, may, by a cross libel, set up the damages they have sustained. *Ib.*

The libellant may proceed in rem or in personam. *Ib.*

AGREEMENT.

Persons undertaking to pack pork, are bound to exercise all the skill and care which the business requires. *Forman v. Miller*, 218.

And if any part of the pork prove to be unsound, the jury will ascertain whether the unsoundness was attributable to the manner in which it was put up. *Ib.*

A comparison of the sale of the sound and the unsound will show the damages. *Ib.*

When land is vested in an association of individuals in equity, the legal title being vested in a trustee, the association may enter into a legal and binding contract among themselves, to relinquish their individual interests in the trust, for a common interest in the whole property, so long as they shall remain members of the association, relinquishing for themselves and their heirs all right, beyond that limitation, to the property, and also all claim for their labor, they receiving during their membership, under the distribution of agencies appointed by themselves, provision for their support. *Goesels v. Bimeler*, 223.

Such an agreement does not require the solemnities of a grant, but is a declaration of trust, which being in writing is valid. *Ib.*

The members of the Society reserve to themselves the power to alter the contract at discretion, and through its agents to sell the property, and also to admit new members on the terms of the original association; under such conditions, the contract is not void, as establishing a perpetuity, 223.

Parties can not, by a contract, agree upon a limitation different from the statute, within which suit shall be brought, or the right to sue be barred. *French v. Lafayette Ins. Co.*, 461.

This would be in conflict with the law and its policy. *Ib.*

Amendment. Assignment. Attachment. Bankrupt Law. Bills of Exchange.

AMENDMENT.

Amendments are made to promote justice. *Tiernan's Executor v. Woodruff*, 135.

It is not sufficient cause to strike out an amendment, because it introduces a new cause of action. *Ib.*

ASSIGNMENT.

A license to run a planing machine may be assigned. *Wilson v. Stolly*, 1. In such case the assignee is bound to perform the condition. *Ib.*

A forfeiture of the license may be enforced by a bill in chancery. *Ib.*

An assignment which delays creditors is fraudulent and void. *Marsh v. Bennet*, 117.

An assignment of a right to a patent may be made before a patent issues. *Marsh v. Orr*, 131.

The extension of a patent by Congress gives no right to an assignee to use the patent under such extension. *Bloomer v. Stolly*, 158.

ATTACHMENT.

An attachment on part of a larger tract of land, without describing the part, too vague. *Biggs v. Blue*, 148.

The judgment being entered the land was sold, and the plaintiff became the purchaser. *Ib.*

The judgment on the attachment was reversed. At common law, where the judgment is reversed the party shall be restored to all he has lost. *Ib.*

BANKRUPT LAW.

A bankrupt procured from his creditor two months time, within which the right to bring suit was suspended, for a valuable consideration, which was set up by the indorser as a discharge from his indorsement. *Tiernan's Executors v. Woodruff*, 350.

In an ordinary case this would be a discharge to the indorser. *Ib.*

But a discharged bankrupt is discharged from all liability on the instrument as against the indorser as well as the payee of the note. *Ib.*

BILLS OF EXCHANGE AND PROMISSORY NOTES.

The acceptor of a bill, which came into his possession, after it had been put in circulation, is presumed to be the owner of the bill, he being an accommodation acceptor, and is entitled to recover its proceeds from the drawer. *Hunter, use of, v. Kibbe*, 279.

The assignee of a note, a citizen of Ohio, may bring his action in the circuit court against the assignor, a citizen of Indiana. *Gaylord v. Johnson*, 443.

A note made payable in Ohio is an Ohio contract, and demand of payment when the note is due, protest and notice are due diligence. *Ib.*

As between the assignee and his immediate assignor, to give jurisdiction it is only necessary that they should be citizens of different States. *Ib.*

The action is on the contract of assignment. *Ib.*

 Admiralty in the District Court. Agreement.

ADMIRALTY IN THE DISTRICT COURT—*Continued.*

vessels of every kind, to avoid accidents and injuries by collisions. Any negligence or want of skill, resulting in injury to others, will entitle the sufferers to remuneration. *Ward v. The Ogdensburgh*, 622.

A competent and vigilant look out, stationed at the forward part of the vessel, and in a position best adapted to descry vessels approaching, is required. *Ib.*

When steam vessels are approaching each other at night, and there is uncertainty, the vessels should slacken their speed, and sometimes stop and make back water. *Ib.*

The defendants in an admiralty suit, who have suffered from a collision, and are in no fault themselves, may, by a cross libel, set up the damages they have sustained. *Ib.*

The libellant may proceed in rem or in personam. *Ib.*

AGREEMENT.

Persons undertaking to pack pork, are bound to exercise all the skill and care which the business requires. *Forman v. Miller*, 218.

And if any part of the pork prove to be unsound, the jury will ascertain whether the unsoundness was attributable to the manner in which it was put up. *Ib.*

A comparison of the sale of the sound and the unsound will show the damages. *Ib.*

When land is vested in an association of individuals in equity, the legal title being vested in a trustee, the association may enter into a legal and binding contract among themselves, to relinquish their individual interests in the trust, for a common interest in the whole property, so long as they shall remain members of the association, relinquishing for themselves and their heirs all right, beyond that limitation, to the property, and also all claim for their labor, they receiving during their membership, under the distribution of agencies appointed by themselves, provision for their support. *Goesele v. Bimeler*, 223.

Such an agreement does not require the solemnities of a grant, but is a declaration of trust, which being in writing is valid. *Ib.*

The members of the Society reserve to themselves the power to alter the contract at discretion, and through its agents to sell the property, and also to admit new members on the terms of the original association; under such conditions, the contract is not void, as establishing a perpetuity, 223.

Parties can not, by a contract, agree upon a limitation different from the statute, within which suit shall be brought, or the right to sue be barred. *French v. Lafayette Ins. Co.*, 461.

This would be in conflict with the law and its policy. *Ib.*

Amendment. Assignment. Attachment. Bankrupt Law. Bills of Exchange.

AMENDMENT.

Amendments are made to promote justice. *Tierman's Executor v. Woodruff*, 135.
It is not sufficient cause to strike out an amendment, because it introduces a new cause of action. *Ib.*

ASSIGNMENT.

A license to run a planing machine may be assigned. *Wilson v. Stolly*, 1.
In such case the assignee is bound to perform the condition. *Ib.*
A forfeiture of the license may be enforced by a bill in chancery. *Ib.*
An assignment which delays creditors is fraudulent and void. *Marsh v. Beaud*, 117.
An assignment of a right to a patent may be made before a patent issues. *Marsh v. Orr*, 131.
The extension of a patent by Congress gives no right to an assignee to use the patent under such extension. *Bloomer v. Stolly*, 158.

ATTACHMENT.

An attachment on part of a larger tract of land, without describing the part, too vague. *Biggs v. Blue*, 148.
The judgment being entered the land was sold, and the plaintiff became the purchaser. *Ib.*
The judgment on the attachment was reversed. At common law, where the judgment is reversed the party shall be restored to all he has lost. *Ib.*

BANKRUPT LAW.

A bankrupt procured from his creditor two months time, within which the right to bring suit was suspended, for a valuable consideration, which was set up by the indorser as a discharge from his indorsement. *Tierman's Executors v. Woodruff*, 350.
In an ordinary case this would be a discharge to the indorser. *Ib.*
A discharged bankrupt is discharged from all liability on the instrument as against the indorser as well as the payee of the note. *Ib.*

BILLS OF EXCHANGE AND PROMISSORY NOTES.

The acceptor of a bill, which came into his possession, after it had been put in circulation, is presumed to be the owner of the bill, he being an accommodation acceptor, and is entitled to recover its proceeds from the drawer. *Hunter, use of, v. Kibbe*, 279.
An assignee of a note, a citizen of Ohio, may bring his action in the court against the assignor, a citizen of Indiana. *Gaylord v. Johnson*, 443.
A note made payable in Ohio is an Ohio contract, and demand of payment when the note is due, protest and notice are due diligence. *Ib.*
Between the assignee and his immediate assignor, to give jurisdiction it is necessary that they should be citizens of different States. *Ib.*
The assignor is on the contract of assignment. *Ib.*

 Contract. Construction of Statutes. Copy Right.

CONTRACT—Continued.

To disaffirm a contract, the property must be returned, if practicable. *Henckley v. Hendrickson*, 170.

A contract was made for the purchase of certain lands, as a consideration for which six thousand dollars were to be paid, and certain work was to be done. The money was paid but the work was not done. A bill being filed for a specific execution of the contract, it was dismissed. *Dennison v. Coquillard*, 253.

CONSTRUCTION OF STATUTES.

Words and phrases used in statutes must be understood in the sense intended by the law maker. *United States v. Irwin*, 179.

General words in a statute, following an enumeration of cases, are held only to apply to such cases. *Ib.*

COPY RIGHT.

An author has a common law right to his manuscripts, and is entitled to an injunction to restrain their publication. *Bartlette v. Crittenden*, 32.

But when published the author has no exclusive right to republish. *Ib.*

The 9th section of the copy right act of 1831, also protects the author's right to his manuscripts. *Ib.*

If a substantial part of the manuscript be published it is an infringement. *Ib.*

The novelty of a work on book keeping, consists in the plan of keeping accounts. *Ib.*

The publication of private letters may be enjoined by the writer. *Ib.*

The author's property in his manuscripts may be transferred or abandoned, like any other property. *Ib.*

Where A, the author of a work in manuscript, contracts with B, a publisher, in writing, but not under seal, or attestation, or acknowledgement, that he may publish a first edition of 1000 copies, paying A fifteen cents for each copy sold; and if a second edition should be called for, A would revise and correct the first edition, and B should stereotype it, and might print as many copies as he could sell, paying A twenty cents for each copy sold; and B takes out the copy right in his own name, with the knowledge and consent of A, and the first edition being exhausted, stereotypes the corrected manuscripts of the second edition, but only prints fifteen hundred copies of the first impression, and when those are sold, proceeds to print more, called a third edition, accounting to A according to the contract; and then sells the plates to C, in another State, to account to B on the same terms; and A thereupon revises a third edition, and causes it to be stereotyped and printed, and takes out a copy right in his own name; and then applies for an injunction against B and C, who file their cross bill against A, praying for an injunction against him, held—That until a copy right has been secured.

Copy Right. Corporations.

COPY RIGHT—*Continued.*

A may license by parol the publication of his manuscript; and if B takes the copy right in his own name, with the knowledge and acquiescence of A, he is the lawful owner of the copy right, subject to the condition of accounting to A, under the contract.

That B can not transfer his copy right to C, but may sell the plates and authorize C to publish, still accounting to A, pursuant to the contract.

That B is bound to keep the market supplied, and may not refuse to print if he can sell.

That B was not limited to the number of copies which he might strike off at the first impression of the second edition, but might print any number he could sell.

That A had no right to print an edition for himself, and take out a copy right, so long as B complied with his contract.

That in the present case, the court has not jurisdiction to grant an injunction, either upon the bill or the cross bill. *Pulte v. Derby*, 328.

CORPORATIONS.

The State Bank of Illinois has no power to purchase land beyond the limitations in its charter. *Russell v. Topping*, 194.

By the common law every corporation had the right to purchase, hold and convey real estate. In England this right has been restricted by the statutes of mortmain. *Ib.*

A corporation can only exercise the power given to it by its charter. *Ib.*

A corporation is not amenable to process except in the State where its business is done. *Northern Indiana R. R. v. Michigan R. R.*, 444.

A corporation in Indiana can not sue, in that State, a corporation doing business in the State of Michigan. *Ib.*

Where the charter of the town of Wellsville requires a certified copy of a summons to be served on the recorder, in all suits brought against the town, the court held it did not apply to an action of ejectment. *Robertson v. Wellsville*, 450.

That in such a case a copy of the declaration and notice was a sufficient service. *Ib.*

By a law of Ohio, all foreign companies of insurance who, through an agency, do business in the State, are held amenable to the process of the State. *French v. Lafayette Ins. Co.*, 461.

All such companies are liable to be sued, and a service on their agents shall bind the companies they represent. *Ib.*

It would be unjust and impolitic to require the injured insured to sue the companies in the State or country where they are located. *Ib.*

There is one agency, if not more, in Cincinnati, from a London (England) office. *Ib.*

Covenant. Crime. Declaration.

COVENANT.

The plaintiff indorsed two notes of the Bank of Washtenaw, Michigan, for fifteen thousand dollars, which notes were discounted by the Mechanics' and Farmers' Bank of Albany, and by that bank the funds of the notes were paid to the creditors of the Washtenaw Bank to the amount of \$2445 61.

At the time of the indorsement, Benedict took to the Washtenaw Bank certain securities, which were sold at auction, and bought by Benedict for \$19,250. The Washtenaw Bank failed, and James Kingaly, receiver of said bank, agreed to collect the securities, rendering a strict account and paying over to Benedict the amount received, until the Farmers' and Mechanics' Bank was paid, including interest, costs and expenses, and the remainder of the securities to be paid to the Washtenaw Bank.

A part of the securities were retained by Benedict.

The defendants became the security of Kingaly, that he should faithfully perform, &c.

An action was brought by the plaintiff on the covenant. Defendants demurred because the plaintiff did not set forth in his declaration in what manner he used diligence to collect the New York securities. This was held not to be necessary, and that the securities being sold to the plaintiff, were subject to the contract and not to his control as receiver. *Benedict v. Maynard & Morgan*, 262.

CRIME.

Any officer of a steamboat, through whose negligence or ignorance, an explosion takes place which destroys life, is guilty of manslaughter. *United States v. Taylor*, 242.

An officer assuming to act as engineer is presumed to be well acquainted with the duties he assumes to discharge, and ignorance is no excuse. *Ib.* In such cases the strictest attention, and a perfect knowledge of the business are necessary to the discharge of the duty. *Ib.*

A steam agency is always attended with dangers. *Ib.*

DECLARATION.

A declaration which states a right acquired to a patent before it issued, is not demurrable. *Rathbone v. Orr*, 131.

Notes being misdescribed in the declaration, the plaintiff may recover on his general counts. *Henckley v. Hendrickson*, 170.

In such case he can only recover the value of the property in the market. *Ib.*

Where certain work was to be done by the defendant, and certain things were to be done by the plaintiffs, to enable the defendant to perform his contract, the declaration must show that the precedent acts were done by the plaintiff to sustain an action. *United States v. Beard*, 441.

A demurrer reaches the first defect in pleading. *Ib.*

Declaration. Deeds. Deposition. Evidence.

DECLARATION—Continued.

Where an assignee of a promissory note sues, the declaration must show that the assignor could have sued in this court. *Fletcher v. Turner*, 468

DEEDS.

The delivery of a deed by the grantor to the recorder, may, under favorable circumstances, be considered a delivery, but it is only *prima facie*.
Bulkley v. Buffington, 457.

DEPOSITION.

If a deposition be taken under the act of Congress, in the absence of the other party, he should take the deposition again, if not satisfied with it.
Goodhue v. Bartlett, 186.

EVIDENCE.

Proof that a letter was stolen from the mail is sufficient to sustain an indictment. *United States v. Fisher*, 23.

Not necessary to aver or prove that the letter contained no article of value. *Ib.*

Evidence on a charge of counterfeiting coin, that the defendant was in possession of counterfeit coin, is admissible, as a presumption of guilt.
United States v. Burns, 23.

There must be proof that the coin charged to have been counterfeited, imitated the genuine coin. *Ib.*

If there were no imitation calculated to deceive, a criminal intent not presumed. *Ib.*

Pork put up for a foreign market being spoiled when it arrived at Baltimore, evidence was permitted to show the condition of the article at New Orleans and Baltimore, from which the jury might determine whether it could have been put up at Madison in good order, as the contract required. *Lawrence v. White*, 108.

But the jury were instructed if they were satisfied the pork was well put up at Madison, they should find for the defendant. *Ib.*

When an instrument is required by law to be recorded, a certified copy, the person being authorized to certify, is evidence. *New York Dry Dock v. Hicks*, 111.

A deed executed in another State, under its laws, is good by the laws of Michigan, and when recorded a certified copy is evidence. *Ib.*

A deed at common law did not require witnesses. *Ib.*

An act required deeds to be recorded by the Register of Probate, but by law the records were transferred to the Register of Deeds, he may certify, being the keeper of the records. *Ib.*

The plaintiff has a right to show any legal title, if fairly acquired. *Ib.*

When no price is agreed upon, the value of the article in the market is the rule. *Henckley v. Hendrickson*, 170.

Evidence. Execution. Executive.

EVIDENCE—*Continued.*

- When there is no unfairness, the price agreed upon must be paid. *Ib.*
- Where a witness swears positively to the hand-writing of an individual, it is sufficient. *Goodhue v. Bartlett*, 186.
- The question as to the source of his knowledge must come from the other party. *Ib.*
- On a charge of counterfeiting coin, if spurious coin be found in the possession of the defendant, and implements to make it, it is evidence. *U. States v. King*, 208.
- The coin must be made to deceive and to pass as genuine. *Ib.*
- If made for any other purpose the party is not guilty under the statute. *Ib.*
- A deed absolute upon its face, may be shown by parol evidence to have been intended as a security. *Dow v. Chamberlain*, 281.
- But parol evidence is not admissible to contradict a written instrument. *Ib.*
- Where a deed was given, with warranty, and a defeasance that the grantor should have a conveyance if, within twelve months, he should pay the debt, although the grantee had a right to sell the whole or a part of the property at a fixed price, in payment of the debt, the deed will be considered as a security. *Ib.*
- Where a witness was examined in a preliminary examination on a charge of robbing the mail, who died before the trial, what he swore to was permitted to be proved on the trial for the offense. *United States v. Macomb*, 286.
- The rules of evidence in civil and criminal cases, in this particular, are the same. *Ib.*
- It is sufficient in such case to prove substantially all that the deceased witness swore to. *Ib.*
- A certified copy of a deed, not authenticated by the seal of the Recorder, is not admissible in evidence. *Hotchkiss v. Glasgow*, 424.
- A witness whose interest is equal on both sides, may be examined. *Bisell v. Farmers' Bank, etc.*, 495.

EXECUTION.

- The equity of redemption, before the act of 1843, in Indiana, might be sold on execution; but that act prohibited such sale by the mortgagee, and required the Sheriff to return the execution, that there was no other property on which to levy. *Campbell v. McManus*, 106.
- Such a return being made in this case, the court set aside the return, as the above act had never been adopted by the federal courts. *Ib.*
- The court adopted the act. *Ib.*

EXECUTIVE.

- The executive, in carrying into effect laws, must necessarily give a construction to them, and such construction is binding on the judiciary, when private rights are not affected. *United States v. Lytle*, 9.

Forfeiture. Fraud. Fugitives from Labor.

FORFEITURE.

A conditional license to use a patented machine, by a non-compliance may be forfeited. *Wilson v. Stolly*, 1.

FRAUD.

A bond obtained through a false representation that the obligee had a requisition from the Governor of Ohio to the Governor of Indiana, on a charge of larceny, was held to be fraudulent. *Bell's Assignee v. Nimmo*, 109.

Fraud is not to be presumed, though it may be proved by circumstances. *Henckley v. Hendrickson*, 170.

Where a deed was executed for land in 1799, to the son-in-law of the grantor, who was insolvent, and who shortly after took the benefit of the bankrupt law of 1800, and placed the same land on his schedule, which was sworn to, and no claim being made under the deed, nor taxes paid for fifty years, the court instructed the jury there were strong circumstances of fraud. *Bulkley v. Buffington*, 457.

FUGITIVES FROM LABOR.

To hinder or obstruct, under the fugitive act of 1793, some act must be done, by defendant, to impair the right of recaption. *Dreskill v. Parish*, 64.

The statute imposes no obligation on any one to aid in the recaption. *Id.*

No penalty is incurred by an individual who is passive, or who insists that the fugitive shall have a fair trial. *Id.*

Force or violence not necessary to hinder an arrest. *Id.*

The withdrawal or removal of a fugitive is sufficient. *Id.*

To sustain a charge for harboring it must appear that it was done to defeat the claim of the master. *Id.*

A temporary shelter, merely, does not incur liability. *Id.*

The officers of the law are its instruments, and can not vary the law. *Id.*

A plea in bar must show that the plaintiff has no right to recover. *Id.*

Under the constitution the master of fugitives from labor may arrest them wherever they may be found, and take them to the place from whence they fled. *Norris v. Newtown*, 92.

A State judge, on proper affidavits, may issue a habeas corpus and inquire into the cause of detention. *Id.*

The affidavit of a colored person is sufficient for this purpose. *Id.*

Every person within a State owes it allegiance. *Id.*

When, by the return of a habeas corpus, it appears that the fugitive is in the custody of the master, or of an officer of the federal government, by process, the State judge can exercise no further jurisdiction. *Id.*

If the return to the habeas corpus be denied the facts may be ascertained. *Id.*

Fugitives from Labor. Habeas Corpus. Indictment.

FUGITIVES FROM LABOR—Continued.

The master, under the decision of the supreme court, may arrest without any exhibition of claim. *Id.*

The 7th section of the fugitive act of 1850 creates new offenses and penalties. *Campbell v. Kirkpatrick*, 175.

The constitution of the United States did not leave the enforcement of the fugitive slave law to the States. It is a federal power, and like all other federal powers, is to be carried out by federal authority. *Miller v. McQuerry*, 469.

Any thing short of this would render the provision nugatory. *Id.*

Under the fugitive law the inquiry is whether the fugitive owes service to the claimant, *Id.*

A decision under this law is no bar to a claim for freedom. *Id.*

The question of freedom may be involved, but a decision against the fugitive is no bar to a claim of freedom. *Id.*

The case does not come under the 7th amendment of the constitution. *Id.*

Such a proceeding is not at common law. *Id.*

The presumption of freedom applies to all persons in a free State, without regard to color. *Id.*

The production of the record is not necessary from the slave State, authorized by the fugitive law, to the claim of the master. *Id.*

HABEAS CORPUS.

Where a person is in custody under the State authority, this court has no authority to bring him before it by a habeas corpus. *United States v. Rector*, 174.

INDICTMENT.

A charge against a carrier with stealing a letter out of the mail is sufficient. *United States v. Fisher*, 23.

If the letter contain an article of value, it aggravates the offense and must be stated. *Id.*

Not necessary to aver that the letter contained no such article. *Id.*

In an indictment for counterfeiting current coin, not necessary to prove the existence of such coin as is designated in the law. *United States v. Burns*, 23.

One or more good counts in an indictment are sufficient, though there be bad counts. *Id.*

To a count for counterfeiting may be added a count for aiding and assisting. *Id.*

The act of the 3d March, 1825, which enumerates as the subject of forgery an "indent certificate of public stock, or deb', or treasury note, or other security of the United States, or any letters patent," inflicts a fine and imprisonment as the penalty, and which repeals by repugnancy the previous law, punishing such offences with death. *U. States v. Irwin*, 178.

Indictment. Indorser and Indorsee. Injunction.

INDICTMENT—*Continued.*

A military warrant is neither an indent nor a public security of the United States. *Ib.*

The forgery of a land warrant not being embraced in the act of Congress expressly or impliedly, is not punishable. *United States v. Irwin*, 179.

In an indictment for cutting timber on the public lands, it is not essential every kind of timber cut should be described. *United States v. Redy*, 358.

An indictment will lie for cutting timber on the public lands, though not reserved for naval purposes. *Ib.*

It is an offense against the post office law of 1825, 45th section, to receive or buy any article that has been stolen from the mail, knowing it to have been stolen. *United States v. Edmund Keene*, 509.

To show that the article has been stolen, the conviction of the individual who stole it is sufficient, if the article be identified. *Ib.*

When an individual is found in possession of stolen property, and fails to show how he acquired it, it is presumptive evidence against him. *Ib.*

INDORSER AND INDORSEE.

Time given by the payee of a note, for a valuable consideration, to the drawer, who had taken the benefit of the bankrupt law, will not discharge the indorser. *Tiernan's Exrs. v. Woodruff*, 350.

The bankrupt, under the act, was discharged from all liability, as well against the indorser as the payee of the note. *Ib.*

INJUNCTION.

A party is not entitled to an injunction to protect him against another person who has assumed the same trade-mark, or label, as to a medicine or drug claimed to have been invented by the complainant, unless his right be clear. *Coffeen v. Brunton*, 256.

If the plaintiff and defendant were concerned in getting up the medicine, both contributing to the compound as a partnership action, neither can claim the exclusive right. *Ib.*

In such a case the court will leave the parties to their legal rights. *Ib.*

Where a case is removed from a State court, which had issued an injunction, the injunction falls, but may be renewed in this court. *McLeod v. Duncan*, 342.

An injunction was granted against the collection of a tax from the Trust Company, alleged to be unconstitutional. *Foot v. Linck, and Trustees of Trust Company*, 616.

The complainant is a stockholder and a citizen of Connecticut. *Ib.*

In such a case the parties being before the court, it can give the same relief, as if the trustees were complainants. *Ib.*

The court will give relief as between the parties on the record. *Ib.*

A suit at law not necessary to authorize the injunction, where the mischief complained of would be irremediable at law. *Ib.*

The allegations of the bill are admitted by the demurrer. *Ib.*

Judicial Sales. Judgment. Jurisdiction.

JUDICIAL SALES.

The State Bank of Illinois has no power to purchase lands, beyond the limitations of its charter. *Russel v. Topping*, 194.

JUDGMENT.

When a title is not up under a judgment on an attachment, although the affidavit on which the writ issued does not appear in the record, the judgment cannot be treated as a nullity. *Heirs of Biggs v. Blue*, 148.

This omission by the clerk does not show that no affidavit was made. *Ib.*
At common law when a judgment is reversed, the party is restored to all he has lost. *Ib.*

And where the thing is certain this is done without a scire facias. *Ib.*
But when the sale is made to an innocent purchaser, the legality of the sale is not affected by the reversal of the judgment. *Ib.*

The sale of the tract followed a description of the property indorsed on the attachment—a part of the tract. *Ib.*

This is indefinite, but may be made sufficiently certain, if the residue of the tract had been sold. *Ib.*

To afford an opportunity to show this, a new trial is granted. *Ib.*

The judgment of a State court, as to the construction of an instrument is not a rule of decision for this court. *Austen v. Miller*, 154.

It is a question of common or mercantile law, rather than the construction of a statute. *Ib.*

A judgment or decree of a court having plenary jurisdiction of the subject matter, being averred, in pleading, it will be presumed that the requisite and prior proceedings were had. *Lathrop v. Stuart*, 167.

The proceedings under the late bankrupt law of the United States are not ex parte in their character. *Ib.*

From a decree in bankruptcy, the prior and necessary proceeding may be presumed. *Ib.*

The certificate and decree are made conclusive by the act. *Ib.*

If a judgment become dormant, its lien is lost, as against a mortgage executed by the judgment creditor, during the continuance of the judgment lien. *Tracy v. Tracy*, 456.

A revival of the judgment cannot affect prior liens. *Ib.*

But such a revival gives a lien on the land of the defendant, not included in the mortgage, and which has on it no prior liens. *Ib.*

The lien of a judgment is not a title to land against which the statute of limitations can operate. *Kemper v. Adams*, 507.

It is a security and not a claim of title. *Ib.*

The conveyance of the land, after the judgment, does not affect the lien. *Ib.*

JURISDICTION.

A suit may be brought, in the circuit court of the United States, in Michigan, on a mortgage on real estate, by a corporation in New York, on

Jurisdiction.

JURISDICTION—*Continued.*

- the ground of comity, there being no law or usage in Michigan against it. *New York Dry Dock v. Hicks*, 111.
- The action of Congress, in the allowance of damages, is conclusive on the judiciary. *U. States v. Williams*, 133.
- It cannot revise the facts on which Congress acted. *Ib.*
- The circuit court can exercise no jurisdiction in a case where the maker and indorser of a note, at the time of the assignment, resided in the State where the action is brought. *Small v. King*, 147.
- If the indorser be an accommodation indorser, and the note never went into his possession or ownership, it can make no difference. *Ib.*
- Where the court exercises a general jurisdiction, irregularities do not make void the proceedings. *Biggs v. Blue*, 148.
- The proceedings on the attachment may be erroneous, which may be ground for reversal; but when the judgment is used collaterally, such errors do not make it void. *Ib.*
- The fugitive law of 1850, gives jurisdiction to the district court, both in the civil and criminal proceedings under the act. *Campbell v. Kirkpatrick*, 175.
- As the circuit court has no jurisdiction, originally, in any criminal procedure under the statute, it seems not to come within the provisions of the act of 1846, authorizing transmissions to be made, of indictments from district to the circuit court. *Ib.*
- The act of 1846 does not relate to civil cases. *Ib.*
- The rule as to jurisdiction in maritime cases is the reasonable one. *Raymond, Libellant v. Schooner Ellen*, 269.
- It is within the reason of the principle of jurisdiction first adopted. *Ib.*
- Where, from the facts of the case, a conveyance of land appears to be only colorable, with the view to give jurisdiction to the courts of the United States, the writ will be dismissed, on motion, or on a plea. *Starling v. Hawks*, 318.
- If the suit is to be prosecuted under the direction of the grantor, and at his expense, and where he has the option within a stipulated time to take back the land, on returning the bond; and where a similar right is given to the grantee, it is sufficient to show that the object of the conveyance was, to give jurisdiction to the circuit court of the United States, and for the benefit of the grantor. *Ib.*
- Citizenship of the parties give jurisdiction in this court. *Rogers v. City of Cincinnati*, 337.
- The State and Federal courts exercise their powers independently, except in special cases. *Ib.*
- The courts of the United States cannot enjoin a suit, in a State court. *Ib.*
- But, if this could be done, an injunction could not be issued where there is an adequate remedy at law. *Ib.*

Jurisdiction. Lapse of Time. License. Lien, Maritime.

JURISDICTION—Continued.

If a city ordinance be in conflict with a commercial regulation by Congress, the defense may be made in the State courts, where the suit is pending, and if the decision be against the regulation, an appeal may be taken to the highest court in the State; and thence by writ of error to the Supreme Court of the United States. *Ib.*

Where a case has been certified from a State Court to a circuit court, under the 12th sec. of the judiciary act of 1789, the case stands as though the suit had been originally commenced in the circuit court. *McLeod v. Duncan*, 349.

An injunction allowed in the State court, on filing the bill, necessarily falls, as the circuit court cannot punish for contempt in the State court. *Ib.*

A motion for an injunction, on the face of the bill, may be made in the circuit court. *Ib.*

A deed, fair upon its face, is not objectionable, as a colorable conveyance, to give jurisdiction, unless proof be shown aliunde. *Hotchkiss v. Glasgow*, 494.

Where a subject is essentially local, as trespass on real estate, the action must be brought in the State where the injury is done. *Northern Indiana R. R. v. Michigan R. R.* 444.

A corporation in Indiana cannot sue, in that State, a corporation doing business in Michigan. *Ib.*

All persons interested must be made parties. *Ib.*

The circuit court takes jurisdiction where a suit is brought from the place where it is located, and where its functions are discharged. *New York R. R. v. Shepard*, 455.

No further allegation of citizenship is required. *Ib.*

By a law of Ohio, suit may be brought against insurance offices, who have agencies in Cincinnati, and a service on the agents is good to bind the corporations. *French v. Lafayette Ins. Co.*, 461.

The agencies established under the law are subject to it. *Ib.*

LAPSE OF TIME.

A lapse of thirty years, after a sale of land to pay debts under an order of court, will not be disturbed. *Newsom v. Wells*, 21.

LICENSE.

A license to run a patented machine may be assigned. *Wilson v. Stolly*, 1.

LIEN—MARITIME.

The giving of a note to a material man does not extinguish the general maritime lien, for the materials furnished in building a vessel or in repairing it. *Raymond, Libellant, v. Schooner Ellen*, 269.

The rule holds where the lien is given by statute. *Ib.*

Limitations, Statute of.

LIEN—MARITIME—Continued.

- The general maritime lien does not apply to domestic vessels. *Id.*
 It is important that the note given should be delivered up at the trial. *Id.*
 This is essential to the maintenance of the action. *Id.*
 The rule as to the maritime jurisdiction over our navigable waters, is the reasonable one. *Id.*

LIMITATIONS, STATUTE OF.

- The statute of limitations does not run against the government, nor is it chargeable with delays, so as to raise a presumption of payment. *United States v. Williams*, 133.
 The statute of limitations in Ohio does not bar a judgment in Ohio. *Todd v. Crum*, 172.
 A judgment is not an agreement, contract, or promise, in writing, nor is it, in a legal sense, a specialty. *Id.*
 Nor is a judgment barred by the provision, that four years shall be a bar to all actions not enumerated in the statute. *Id.*
 The statutes of Illinois require a possession and claim of title in good faith, paying taxes for seven years, the claim of title being deducible of record from the State or the United States, &c. The defendant claimed by mesne conveyances, a tract of land at a tax sale in 1839, by deed from the purchaser. Was in possession seven years, &c., but a deed to the purchaser at the tax sale was not made until 1850, when it should have been made in 1840. *Held*: that the defendant was not within the purview of the statutes, and was not protected by them. *Holden v. Collins*, 189.
 That the deed having been made under a sale which the supreme court of Illinois held to be illegal, could not relate back to the sale so as to protect the possession of the defendant. *Id.*
 The rule would have been different had the deed been made in 1841. *Id.*
 The governor and judges, in the first stages of the territorial government of Michigan, had power to adopt the laws of the respective States, but had no legislative authority. *Peck v. Pease*, 486.
 A law adopted from Vermont in 1820, was adopted as the statute of limitations, in which the word "or," instead of the word "and," giving the benefit of the statute to a person beyond the limits of the State, whereas, the Vermont statute required the person not only to be beyond the limits of the State, but of the United States. *Id.*
 In 1825, a commission to revise the law, was appointed, and authorized to alter and report new bills, &c.; the report included the law in question, with others, and in 1827, all the laws in force were published by authority, there being no alteration in this act. *Id.*
 There was another revision of the laws in 1833, which was again published by authority, making no alteration in this act. *Id.*

Limitations, Statute of. *Martha Washington Case.*

LIMITATIONS, STATUTE OF—Continued.

Held : that under the circumstances, the court could not look back to the law of Vermont to correct any error on the first adoption of the law. *Ib.*

A judgment is not a title to land against which the statute of limitations runs. *Kemper v. Adams*, 507.

MARTHA WASHINGTON CASE.

The 23d sec. of the act of Congress of the 3d of March, 1825, which punishes a conspiracy to destroy a vessel or cargo with intent to defraud the underwriters, is constitutional. *U. States v. Cole et al.*, 513.

The object of the act is, to protect commerce, and the protection to underwriters is incidental. *Ib.*

The act applies to our internal as well as to our foreign commerce. *Ib.*

The mischief is as great in the one case as in the other. *Ib.*

And the opportunities to commit the offense, are much greater in our internal, than in our foreign commerce. *Ib.*

This Congress has as full power to do, for the protection of commerce among the several States, as for the protection of commerce with foreign nations. *Ib.*

After prima facie evidence has been given of a conspiracy, the statements of those implicated, though not included in the indictment, is evidence.

This is on the principle, that where a combination of individuals has been formed, to commit an unlawful act, they have assumed an individuality in doing the wrong, and the conduct of each one in doing or promoting the act, is chargeable on the whole.

The burning of the vessel is not necessary to complete the offense.

Any combination of two or more persons to destroy the vessel or cargo, consummates the offense under the law, though neither the vessel nor the cargo is injured.

The act strikes at the incipient stages of the offense.

In its object it is preventive, by punishing the design to do the act.

Circumstantial evidence may be as satisfactory to a jury as positive. Sometimes it is equal to positive proof.

The destruction of the vessel by the defendants, or by any one of them, identified with the defendants as conspirators, would be conclusive against them.

The burning of the vessel is not punishable under the act of Congress, but it operates as evidence against the defendants.

The testimony to show the unlawful combination does not end at the destruction of the boat.

After, as well as before that event, the acts of the confederates may be proved to show their guilt.

Martha Washington Case. Methodist Church Case. Mortgage.

MARTHA WASHINGTON CASE—Continued.

Their entire acts, in relation to the subject matter of the indictment which conduce to show a guilty purpose, may be proved.

The jury are the judges of the credibility of witnesses.

The manner in which a witness testifies, the opportunity he had of knowing the facts he swears to, and his whole deportment in making his statements, will necessarily have an effect with the jury in giving or withholding their confidence in his statements.

In coming to a conclusion of guilty or not guilty, the jury will weigh the evidence, and exercise their best and most deliberate judgment.

They will not convict unless their minds are clearly convinced of the guilt of the accused.

But if so convinced, they will not be deterred from a conviction of the defendants, in whole or in part, as the evidence may require, from the consequences which may follow.

We have only to look at the facts and the law. With consequences we have nothing to do.

But if the jury are not satisfied of the guilt of the defendants, beyond reasonable doubt, an acquittal should follow.

METHODIST CHURCH CASE.

The general conference of the Methodist Episcopal Church is a delegated or representative body, with limited constitutional powers; and possesses no authority, directly or indirectly, to divide the church. *Smith v. Swormstedt*, 369.

In the adoption of the "plan of separation," in 1844, there was no claim to, or exercise of, such a power. *Ib.*

As the general conference is prohibited from any application of the produce of the book concern, except for a specified purpose, and in a specified manner; and as the annual conferences have refused to remove this prohibition, by changing or modifying the sixth restrictive rule, the general conference has no power to apportion or divide the concern, or its produce, except as provided for by the rule. *Ib.*

The book concern is a charity for specified objects. A withdrawal of a part of the church carries with it none of the rights which appertained to it, while united. *Ib.*

And the Western book concern, in withholding from those who seceded, any part of the product of that concern, committed no injustice. *Ib.*

This is not a case of lapsed charity. *Ib.*

MORTGAGE.

The plaintiff held a mortgage on a certain tract, which he foreclosed, and it was decreed to be sold. At the sale it was purchased by the State Bank of Illinois, and the plaintiff received the purchase money. But the mortgagor being otherwise indebted to the plaintiff, he recovered a

Mortgage. Motion for New Trial. Notice. Parties. Partners. Patent.

MORTGAGE—Continued.

judgment, under which the same land was sold, and the plaintiff become the purchaser, though he had received the money on the first sale. It was held that he had a right to contest the title of the bank. *Russell v. Topping*, 194.

MOTION FOR NEW TRIAL.

Letters of one of the parties having been read, is not a surprise, for which new trial can be granted. *Henckley v. Hendrickson*, 170.

The circuit court may grant a new trial in a criminal case. *U. States v. Macomb*, 286.

NOTICE.

A justice of the peace in Mississippi, ex officio, is a notary public to make demand of payment and enter protest of a note, and give notice to the indorser. *Austen v. Miller*, 153.

The next mail after the protest is sufficient notice. *Ib.*

PARTIES.

A corporation may sue in a State, other than that in which it was incorporated, by comity. *New York Dry Dock v. Hicks*, 111.

And on the same principles, lands when taken in security for the payment of a debt, or in payment, may be held in another State, there being no law to the contrary. *Ib.*

PARTNERS.

On a dissolution of partnership, one partner takes the assets, and agrees to pay the creditors equally, he becomes a trustee for the creditors, and any appropriation of the assets contrary to the stipulation, is fraudulent and void. *Marsh v. Bennet*, 117.

A stipulation in a deed of assignment to delay creditors, or forfeit their claims, is fraudulent. *Ib.*

PATENT.

It is the province of the court to construe the patent. *Parker v. Stiles*, 44.

The jury are to judge of the description of the claim. *Ib.*

The test of originality is, that the thing invented was not known before. *Ib.*

That the thing claimed was before known, defeats the patent. *Ib.*

The term principle is used in reference to the particular method of producing a certain result. *Ib.*

Where the invention consists of various parts, the infringement of any one may be enjoined. *Ib.*

But where the patent is for a combination of different parts, the whole must be infringed to authorize an action. *Ib.*

A mechanical equivalent is a means adopted to accomplish the same object. *Ib.*

Patent. Pleadings.

PATENT—*Continued.*

- A principle cannot be patented. *Smith v. Ely*, 76.
- An exclusive right to a motive power of electricity or steam, can only be secured by the instrumentality of mechanical inventions or combinations, which produce a certain effect. *Ib.*
- An inventor may sell his invention before he obtains a patent. *Rathbone v. Orr*, 131.
- And after the patent has been obtained, the contract will secure to the assignee the extent of his right. *Bloomer v. Stolly*, 158.
- By the construction of the act of 1836, the licensee of a planing machine, may run his machine, under an extension of the right, by the act. *I*
- But that can have no application to an extension by act of Congress. *Ib.*
- There being no provision in the act extending the right, nor in the contract, that the assignee should have an interest in the renewal of the patent, none can be implied. *Ib.*
- A surrender and correction of a patent, gives effect to it, in all cases of infringement subsequently accruing, though the patent was originally invalid. *Ib.*
- And for this purpose, the correction of the patent is considered, as having been made at the time it was issued. *Ib.*
- The right to construct a patented machine, is distinct from the right to use it. *Bicknell v. Todd*, 236.
- The right to use necessarily implies the right to repair, and also a right to purchase a machine, where the one in use is destroyed, or too much worn for use. *Ib.*
- A patentee may reserve to himself the right to prosecute for piracies within the district where the right of use is conveyed; but if he shall afterward divest himself of that right, by conveying all his interest in the patent, within the district, the person who owns the right may prosecute for piracies. *Ib.*

PLEADINGS.

- A plea in bar must show the plaintiff has no right to recover. *Smith v. Ely*. 76.
- If the facts of the plea may be admitted, and yet the action may be maintained, the plea is bad on demurrer. *Ib.*
- Oyer is not demandable of letters patent. *Ib.*
- To an action of debt for eight hundred and four dollars, the defendants pleaded, that the obligee represented to them that he had a requisition on them from the Governor of Ohio to the Governor of Indiana, to surrender them on a charge of larceny in Ohio, which was false, but in consequence of which the bond was given. *Bell's Assignee v. Nimmo*, 109.
- In Indiana, bonds are made assignable by statute, but the obligor may set up any defense, though assigned, as against the obligee. *Ib.*

Pleadings. Practice.

PLEADINGS—*Continued.*

The demurrer admitted the fraud alleged in the plea, and the plea was sustained. *Ib.*

An unliquidated demand cannot be set off against the government, as between individuals. *U. States v. Williams*, 133.

To an action on a judgment the defendant cannot, in his plea, contradict the record. *Todd v. Crum*, 170.

Where the cause of action is local, a reference to the district aforesaid, named in a preceding count, is a sufficient designation of the place. *Jones v. Vanzandt*, 214.

Though a State be named which, in law, is a district, the reference to the district, a term used in the law, the reference will be held to mean the district before named, and not the State. *Ib.*

If counts be abandoned, they are not for all purposes considered as stricken from the record. *Ib.*

As matters of reference in subsequent courts, they are good. *Ib.*

Under the act of 1793, for the reclamation of fugitives from labor, if the action be for the penalty, the acts of the offender must be alleged as contrary to the statute. *Ib.*

This may not be necessary when the action is brought to recover the value of the slaves. *Ib.*

An action for false imprisonment is trespass. And this is the case whether the imprisonment be charged under color of process or not. *Stanton v. Seymour*, 267.

In this action, matters of aggravation may be proved without being stated in the declaration. *Ib.*

A plea must be single. *Ib.*

It must rest the defense on a single point. *Ib.*

In a declaration on a bond to indemnify, the injury must be averred. *Coe v. Rankin*, 254.

A general averment of loss is sufficient. *Ib.*

Where a suit is founded on the record of a judgment, in which the court had jurisdiction, no errors in the pleadings can be considered. *French v. Lafayette Ins. Co.*, 461.

Nor in such a case can nil debit be pleaded. *Ib.*

Where the assignee on a promissory note sues, the declaration must show that the assignor, by his citizenship, had a right to sue in this court. *Fletcher v. Turner*, 468.

PRACTICE.

A law of the State regulating the practice of the State courts, does not apply to the courts of the United States, unless adopted by act of Congress, or by rule of court. *Yaw v. Mead*, 272.

A statute of a State which regulates the procedure on a bill of foreclosure,

Practice. Railroad. Sale.

PRACTICE—Continued.

does not apply to the courts of the United States. *Dow v. Chamberlain*, 281.

They do not derive their chancery jurisdiction on their rules of practice from State authority. *Id.*

RAILROAD.

A citizen of another State, has a right to come into the circuit court of the United States, asking for an injunction to restrain the acts of a corporation, incorporated under the laws of Ohio, which, if consummated, would do irreparable injury to his property in Ohio. *Works v. Junction R. R.*, 425.

Where the termini of a road are fixed by its charter, and points are named between them, those points cannot be disregarded. *Id.*

Where a railroad is authorized to make branches from the main route to other towns or places, in the several counties, does not authorize the construction of a road from one county into another. *Id.*

The right to cross a navigable water by a railroad bridge, must be given by the sovereign power. *Id.*

The acting commissioner of the board of public works may approve of the plan or structure of a bridge. *Id.*

A drawbridge over a navigable water, although it occasion some delay, is not a nuisance. *Id.*

To authorize an injunction, the obstruction must be material, and clearly established. *Id.*

When two railroad companies agree to build a road from certain cities, to connect with each other at a given place, and that the charges for transportation shall be regulated by both companies, and also the meeting of the cars, and the through freight cars, if one of the companies shall change its gauge, so as to break up the connection contemplated, an injunction will be granted. *Ohio R. R. v. Indiana R. R.*, 450.

A contract entered into by one of the parties to make its gauge against the statute, is not void, if the contract was made with reference to procure the sanction of the legislature.

If both parties agree to fix the price of transportation, it is no abandonment of their franchises. *Id.*

The Indiana road having been made upwards of forty miles, when the contract was entered into, shows what gauge the entire road was to be. *Id.*

SALE.

If an agent purchase, at his own sale of property, it is voidable, not void. *Price v. Morris*, 4.

Lands in Ohio are subject to pay debts, and where a sale has been made, under an order of court after the lapse of thirty years, the court will not disturb it. *Newson v. Wells*, 21.

Slaves. Statute of a State. Surety. Treaty. Treasury Department. Title.

SLAVES.

Slavery is a municipal regulation ; is local, and cannot exist without the authority of law. But it need not be shown that it was created by express enactment. It may exist from long recognized rights, counter-vened by no legislative action. *Miller v. McQuerry*, 469.

STATUTE OF A STATE.

A State has no power over the public lands within its limits. *Turner v. Baptist Missionary Union*, 344.

When the State of Michigan was admitted into the Union, it assented to a compact, which inhibited the exercise of this power. *Ib.*

SURETY.

A surety on a Surveyor General's bond is bound for the faithful performance of duties under the instruction of the executive. *U. States v. Lytle*, 9.

TREATY.

A treaty is the supreme law of the land only, when the treaty-making power can carry it into effect. *Turner v. Baptist Missionary Union*, 344.

A treaty which stipulates for the payment of money, undertakes to do that which the treaty-making power cannot do, therefore such a treaty without the sanction of Congress, is not the supreme law of the land. *Ib.*

And in this action the Representatives and Senators act on their own judgment and responsibility, and not on the judgment and responsibility of the treaty-making power. *Ib.*

No act of any part of the government can be held to be a law which has not all the sanctions to make it a law. *Ib.*

Where, in a treaty, 160 acres of land was reserved to be sold, in order to pay over the proceeds of the sale to those entitled to them, is a withdrawal of the land from appropriation. *Ib.*

TREASURY DEPARTMENT.

The treasury department cannot enlarge the duties of a Surveyor General ; but where his district depends upon the construction of various acts of Congress, and these acts have been uniformly construed one way, which Congress have sanctioned, it is conclusive on the judiciary. *U. States v. Lytle*, 9.

TITLE.

A title by deed implies a contract, between competent parties. A deed to a person having no existence is generally inoperative, and passes no title from the grantor. *Russel v. Topping*, 194.

The modern authorities regard a mortgage merely as a security for the debt, and until sale the title to the mortgaged property is in the mortgagor, subject to the incumbrance. *Ib.*

Title. Trespass on Public Lands. Usury. Will.

TITLE—Continued.

A religious association assuming the name of the "Separatist Society of Zoar," being unincorporated, cannot hold property in the name assumed. *Goessele v. Binseler*, 223.

Nor can the directors and their successors in office, appointed by the society, hold it, as the law recognizes in them no succession. *Id.*

But the conveyance of land to an individual and his heirs, for the use of the society, constitutes him the trustee, and the members the cestui que trusts. *Id.*

Where land has been paid for by the proceeds of the joint labor of a community, each individual, unless the contrary be made to appear, will be presumed to have an equal interest in the land. *Id.*

TRESPASS ON PUBLIC LANDS.

Where full reparation was made for a trespass on the public lands, by purchasing the land in part, and by paying the purchaser of the other part, for the trees cut on it, a nominal fine only was imposed. *U. States v. Murray*, 207.

The trespasser seemed to have had no intention of defrauding the public. *Id.*

To bring a case within the 2d sec. of the act of Congress of the 2d March, 1831, entitled an act to provide for the punishment of offenses committed in cutting, destroying, or removing live oak and other timber or trees for naval purposes, the libel must allege that the timber transported by the vessel, &c., to incur a forfeiture, was done knowingly by the master, &c., taken from lands reserved for naval purposes, or that the timber so transported, was cut on lands of the United States, not so reserved, and was live oak or red cedar. *U. States v. The Schooner Helena*, 273.

USURY.

It is not usury, when the writings are not executed at the time of the contract, to charge interest from that date. *U. States v. Williams*, 133.

WILL.

In 1812, a citizen of Kentucky made his will, in which he said: "I give and bequeath every part of my estate, of every kind whatsoever, to be equally divided (by sale or otherwise, as may be deemed best), between my loving wife, and my children, not heretofore named, and their heirs forever, having particular regard to the education of my children; not as yet educated." His wife, two of his sons, and son-in-law, were named in the will as executors. The wife only took out letters testamentary. *Dunlap v. Pyle*, 322.

The above will did not authorize the executors to divide or sell the real property in Ohio. *Id.*

Especially it did not authorize the husband of the widow, to whom she was afterward married, to sell and convey these lands as agent. *Id.*

 Will. Witness.

WILL—Continued.

The sale made by him, and the deeds he executed, are void. *Ib.*

The devisees being non-residents, the statute of the limitations **does not** run against them, except against John Boyce, who was within the State when the land was sold. *Ib.*

A right which subsequently fell to him; on the death of a brother and sister, is not barred. *Ib.*

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Where a witness swore to certain items charged, of which he had no personal knowledge, his statement was overruled. *Goodhue v. Bartlett, 186.*

A witness, to entitle him to his per diem against the losing party, must have been summoned by the marshal or his deputy. *Dreskill v. Parish, 213.*

A witness may be summoned, if within one hundred miles of the place of holding court, though he be beyond the limits of the district. *Ib.*

A subpoena runs throughout the district. *Ib.*

Where a person is summoned as a juror, and, at the same term, is subpoenaed by the United States as a witness, and attends in obedience to each process, and, according to the practice of the court, makes affidavit of such attendance, he is entitled to compensation for each service. *Edwards v. Bond, 300.*

And upon the facts being shown by petition, and admitted by the marshal, a rule absolute was entered, directing the marshal to pay the amount. *Ib.*

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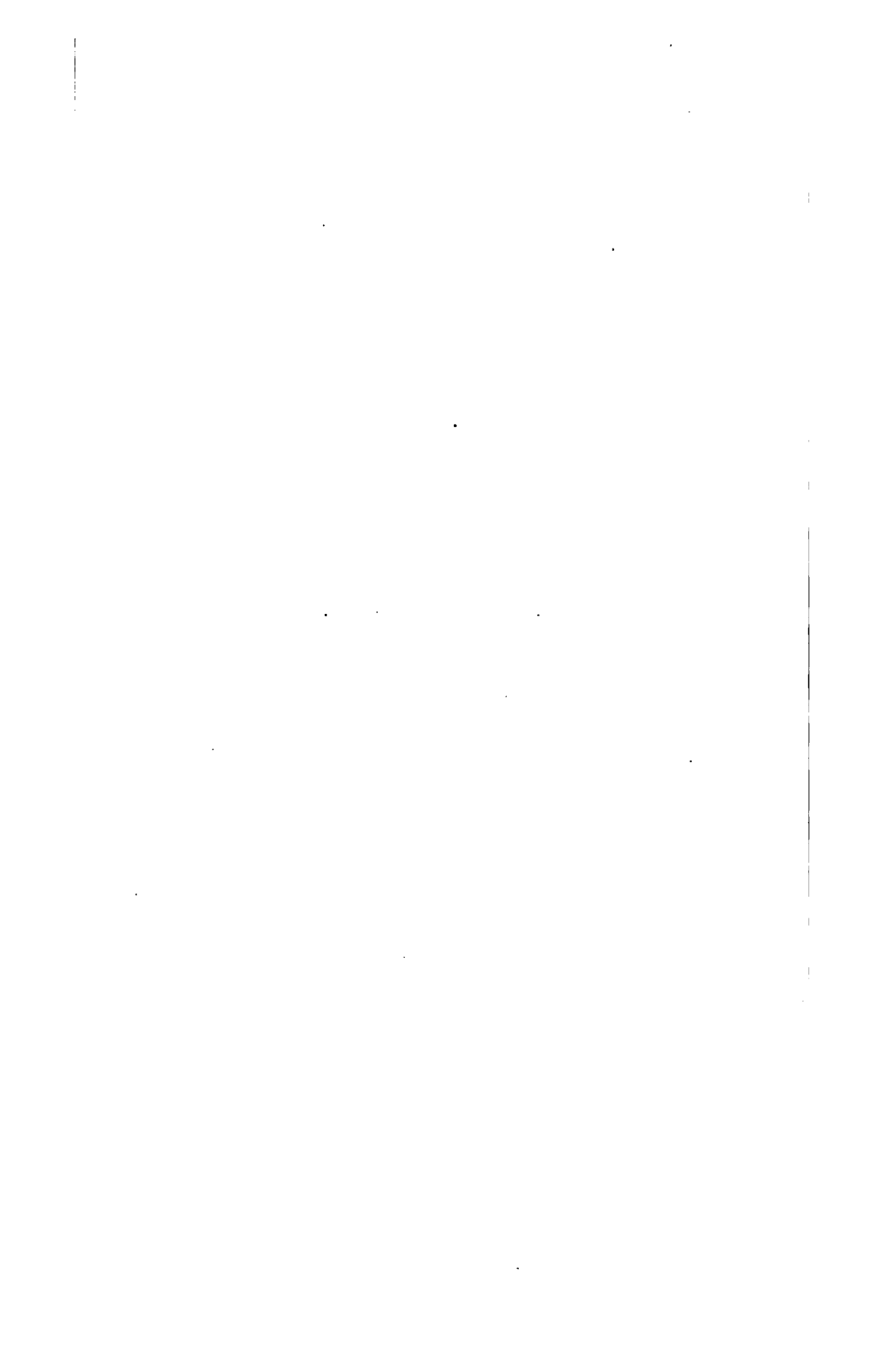
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Slaves. Statute of a State. Surety. Treaty. Treasury Department. Title.

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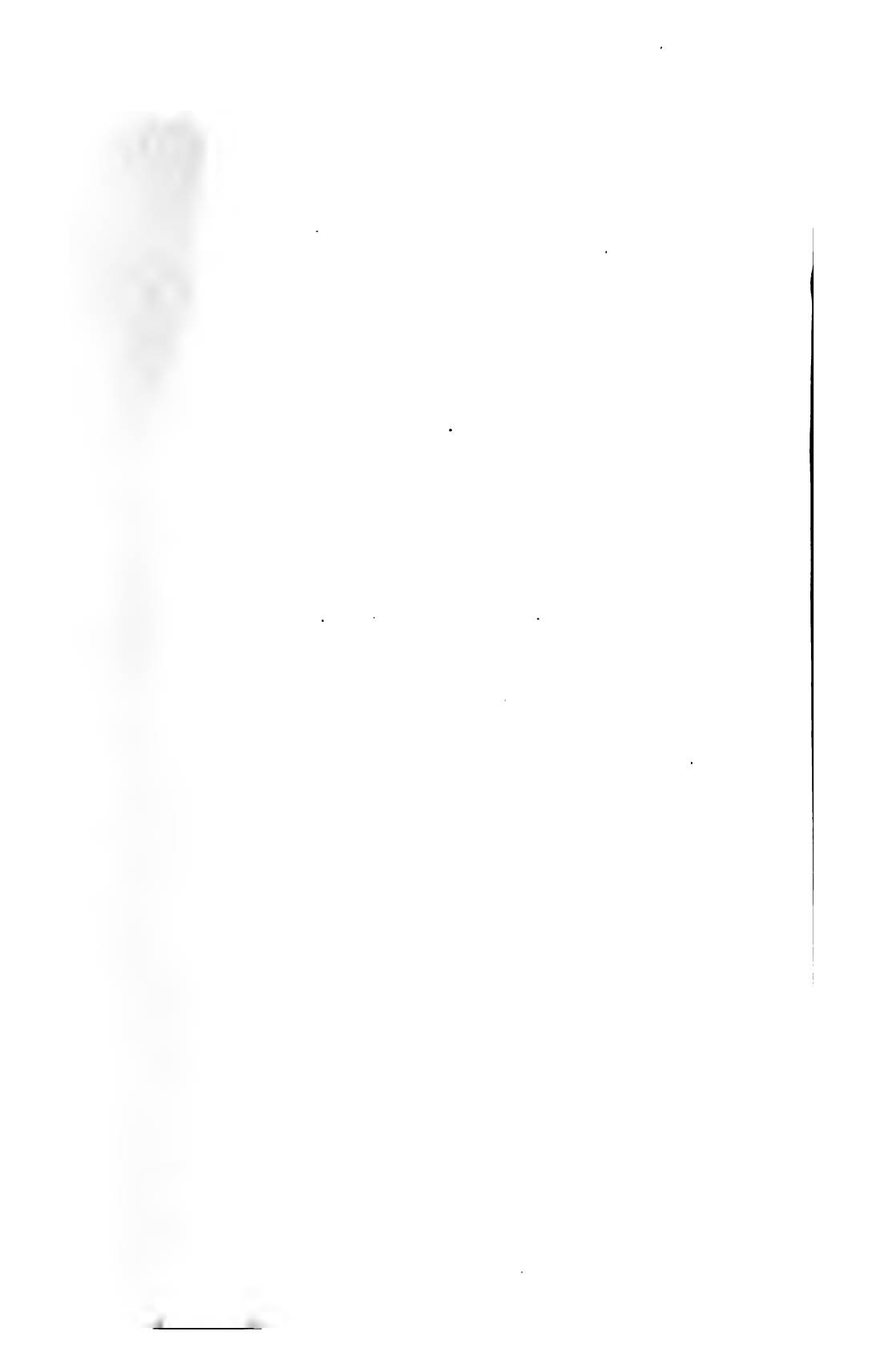
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